EXHIBIT 59

02 1250

Transcript of Record
Appeal
to
Appellate Court of Illinois
First District

Circuit Court No. 02 CR 16669

Trial Judge JOHN KIRBY

Reviewing Court No. 05-3447

PEOPLE OF THE STATE OF ILLINOIS

vs.

JAMES FLETCHER

from

CIRCUIT COURT
of
COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, CRIMINAL DIVISION

REPORT OF PROCEEDINGS ONLY..
VOLUME SIX OF Seven VOLUMES

DOROTHY BROWN,
Clerk of the Circuit Court

Per DB/JF
Deputy

VI

STATE OF ILLINOIS)
)
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CRIMINAL DIVISION

THE PEOPLE OF THE)
STATE OF ILLINOIS)
)
-VS-) No. 02 16669
)
JAMES FLETCHER)

REPORT OF PROCEEDINGS in the above-entitled cause taken before the Hon. JOHN P. KIRBY, Judge of said court, on June 16, 2005.

PRESENT:

HON. RICHARD A. DEVINE,
State's Attorney of Cook County, by
MS. AIDAN O'CONNOR,
Assistant State's Attorney,
representing the People;

MR. REGINALD HILL and MR. JOSEPH SALTIEL,
Private Attorneys,
Jenner & Block,
representing the Defendant.

Victoria A. Ondriska
Official Court Reporter
#084-001457

DATE: 6-16-05
PAGES: 1-132

I N D E X

PAGE

THE CLERK: James Fletcher.

THE COURT: Okay. This is the case of People vs. James Fletcher.

Counsels, would you please state your names?

MS. O'CONNOR: Aidan O'Connor for the People.

MR. SALTIEL: Joe Saltiel.

MR. HILL: Reginald Hill on behalf of the defendant, James Fletcher.

THE COURT: This is here on the Defense motion for a new trial, and a motion to dismiss the indictment for failure to commence prosecution within a reasonable time.

Are both sides ready to proceed?

MS. O'CONNOR: Yes, Judge.

MR. SALTIEL: Yes, your Honor.

THE COURT: Okay.

Counsel, you may proceed.

MR. SALTIEL: Which motion?

THE COURT: Let's do the motion to dismiss for failure to commence prosecution.

MR. SALTIEL: I guess I'd like to begin to just quickly re-hash some of the key dates, because one of the important aspects is the fact it did take over eleven years for the State to arrest James Fletcher.

The incident occurred that led to his arrest on December 21, '90. Mr. Fletcher wasn't arrested for this crime until April of 2002.

Now, the standard for a motion to dismiss for failure to commence prosecution in a reasonable time, it is a two-part test as dictated in People v. Lawson. First, that the defendant -- the delay caused the defendant actual prejudice. And that, second, the delay was unreasonable.

And I'd like to point out to the Court that in the case People v. Gulley (phonetic), the court in there stated that the length of delay in that case which was only 51 months causes a great suspicion and the presumption that the delay was prejudicial. And that was only a 51 month delay. And here we are looking at a eleven year delay until arrest, and over fourteen years until trial.

There are two main areas where the delay caused the defendant prejudice. The first was with respect to the defendant's ability to put on an alibi defense.

At trial, the defendant called Miss Sanders as an alibi witness. Miss Sanders testified that she met the defendant in Memphis, around, or the week before

Christmas. And this, of course, the incident which he was arrested for occurred in Chicago. So if he was in Memphis, obviously, he couldn't have committed the crime in Chicago.

However, Miss Sanders was not able to remember the exact date because of the length of time that transpired.

And this is a noteworthy point, because as in the case I previously mentioned, People v. Gulley, the court in that case stated that an alibi witness should not be expected to remember an uneventful day -- in that case that was four years ago -- to negate the evidence from the State. Here she was being asked to remember an incident that was almost fifteen years ago to the exact date.

Now, not only could she not remember the exact date, she couldn't remember the name of the hotel. This is significant, because if she was able to remember the name of the hotel, we could have gotten documentary evidence to support the alibi. Even after fifteen years, if she was able to remember the name of the hotel, it was highly unlikely the hotel will have any evidence verifying his presence at the hotel after fifteen years.

The second aspect where Mr. Fletcher was prejudiced was with respect to Terry Rogers. Terry Rogers was one of the witnesses at the 1990 incident, and was also one of the people that identified Mr. Fletcher to the police. And if it wasn't for Mr. Rogers' identification, Mr. Fletcher would have never been arrested. And I think at one time the Court even commented itself that Terry Rogers was a key player in this investigation.

Not only was he one of the key witnesses, but he appears to have been a potential suspect at one time. In 1995, another one of the witnesses told the police that he suspected Mr. Rogers was involved in the incident, and that was the reason why they sought to question Mr. Rogers about the incident. And they couldn't find Mr. Rogers until he was arrested in 2002 for suspicion of arson. It was at this time in '02 that Terry Rogers had changed his story, because originally, 1990, he didn't say he knew Mr. Fletcher. All he said was that he heard one suspect say to the other suspect, "Come on, Fletcher, let's go."

But in 2002, after being arrested for arson and the police come to interview him, you know, he all of a sudden changes his story. Now his story is, "Yeah,

I knew Jimmy Fletcher. You know, I knew him from the neighborhood. We served time together, you know. This was a guy you are looking for for this 1990 incident."

So not only is Mr. Rogers a key witness, but he's also a potential suspect, and we were denied to present that opportunity to present that to the jury because he wasn't there.

Also Mr. Rogers' statements were used against Mr. Fletcher at trial. We were unable to cross-examine Mr. Rogers because he wasn't there. And this was a violation of Mr. Fletcher's 6th Amendment right.

As you recall Mr. Rogers' statement, when he identified Fletcher in 1990, that came in at trial, and again when he identified the defendant by the name of James Fletcher in '02. Both those statements came in at trial. Now, because he wasn't there, we were unable, you know, to cross-examine him and the credibility of the statements.

So those are the two areas where we believe that Mr. Fletcher was prejudiced at trial because of the delay.

Now, the delay on the part of the State is not reasonable. All of the witnesses were available earlier on. They could have proceeded earlier on. There was no

new evidence gathered after 1990, other than the fact that one of the witnesses changed his name.

THE COURT: I'm sorry?

MR. SALTIEL: I'm sorry. He changed his statement to the police. That was the only difference from the information they had in '90.

Mr. Fletcher's whereabouts had been known since '90. In '90 he was on parole. And then from approximately '91 to '92 on, he's been in the custody of the Illinois Department of Corrections. So his whereabouts have been known.

The other witnesses' whereabouts have been known. Terry Rogers' whereabouts were known because he was in and out of prison and in and out of trouble up through '95. He went missing for approximately seven years. But in 2002, he was again available, because he was arrested and he served some jail time as well. And it was after his release from his last jail sentence that the State was unable to find him and bring him to trial.

So for those two reasons, we believe that the State, that the Court should grant our motion to dismiss.

THE COURT: Okay.

State, your response?

MS. O'CONNOR: Yes, Judge.

In response, our first response is that we believe that the subject of this motion is, should be part of a pre-trial motion as opposed to a post-trial motion. The statute says that it should be filed before trial.

So we would object to it on that basis.

But in addition --

THE COURT: What statute are you referring to?

MS. O'CONNOR: Motion to dismiss under Chapter 725, I think it is -- I'm sorry. I don't have my statute book with me. I should have. It's -- I think it's 725 114 -- 5, but I'll look it up to make sure.

It's 725 ILCS 5/114 -- 1, motion to dismiss charge, which is sub-section under Article 114 which is pre-trial motions. And that section, Judge, indicates that such a motion to dismiss should be filed pre-trial.

And what the statute does is it lists and enumerates several bases under which such a motion can be filed. This one isn't one of those bases. Because this one falls under the general category of the due process violation.

That's what the defendant is alleging. He is

not alleging one of the enumerated paragraphs. But this motion to dismiss falls under that sub-section, and the case law that Counsel refers to refers to, and all other cases that discuss the issue of a motion to dismiss based on due process due to delay in charging falls under that section, Judge.

So that would be our first argument.

If the Court is going to consider their motion anyway, we have several arguments that we believe show that they don't have a basis for, or the Court would not have a basis for granting their motion.

And first of all, the overriding concept of due process is to allow the defendant to prepare a defense to a charge. But there are several other concepts that have to be considered in the realm of what is a reasonable delay. And Mr. Saltiel already referred to the Lawson case that sets out that two-step process, and then the balancing the Court has to take into consideration.

In addition to that two-step process and the balancing is the seriousness of the crime. And I think that all courts would say that murder would be the most serious crime heard in state courts.

The cases that Counsel refers to, Gulley, that

he relies on in his motion is a narcotics case wherein the defendant was a known offender from Day One. It was an undercover narcotics operation. The seriousness of that crime couldn't compare to the seriousness of a murder crime. And the statute of limitations here in Illinois doesn't exist for the crime of murder. The crime of murder can be brought at any time.

And we suggest to this Court, and the cases do discuss statutes of limitations, that the fact that the legislature has provided for no statute of limitations for the crime of murder could certainly mitigate towards the fact that the crime is so serious that charges can be brought at any time.

But in looking at the overall process the Court needs to go through in determining whether due process has been violated, it is our position that the Court also has to look at the investigation itself. And was there bad faith? Was there foot dragging on the part of law enforcement?

And we submit in this case, contrary to Mr. Saltiel's argument, there is not one scintilla of evidence that this defendant could have been identified or arrested or charged prior to 2002. He says that the police knew the identity of the shooter in this case,

the defendant, prior to 2002, and that's totally inaccurate. The only information they have that would have helped lead to an identification was the last name of the defendant, and that was Fletcher.

And to say that because one witness said that a man named Fletcher was involved in the case should have allowed the police to identify him and arrest him and charge him is ridiculous. Fletcher is a common name. They didn't even have an address. It was a passing reference made by a witness who said that he didn't know who had committed this crime.

In 2005 when the police were assigned to re-investigate this case and review --

THE COURT: 2005?

MS. O'CONNOR: What? I meant 1995. I'm a decade ahead of myself.

In 1995, when Detective Bogucki and Shalk were taking a second look at some old murder cases, including this one, all they still had to go on was the name Fletcher. And they had found another case of someone I believe named Clinton Fletcher who they got a photo of and found that he had been living in that area and showed it to Mr. Cooper who indicated that that wasn't the killer in this case.

That, of course, didn't come out at trial, because non-identifications of a possible suspect could not be admissible in this trial. So that did not come out during the trial.

However, all the police reports and the discovery that was tendered to Counsel, certainly they were aware of that.

So as of 1995, all they still had was the bare fact of the last name of Fletcher.

Now, it's true that during the 90's, the defendant was incarcerated. First, during the 90's, I believe, incarcerated under the name Arnold Dixon. He had before this murder been incarcerated under the name of James Fletcher. Because he had been convicted of murder -- released -- this crime was committed by the defendant, he was not caught, and then he was arrested for and convicted of an armed robbery charge.

So during the 90's, he was incarcerated, and still is incarcerated for the armed robbery that he was sentenced to twenty-five years under the name Arnold Dixon. It was prior to the murder that is now the subject of this post-trial motion. The murder prior to this, he had been convicted under the name of James Fletcher. So he was actually out of prison from that

murder when he committed this murder, and then subsequently went into custody under the name of Arnold Dixon.

So even though he was in the custody of the Illinois Department of Corrections, there is not one, there was not one shred of evidence that would have led the detectives in any way to find that man in prison until the man named Terry Rogers was arrested in 2002 and at that time decided to tell the police more information that he had about this 1990 murder. And that it is then that the police became aware of this James Fletcher, did their investigation, got photos, went to the prison, conducted lineups, and he was charged within a very short time of receiving the information from Mr. Rogers.

And I mean, I don't know how they in good faith can tell this Court that the police had any information with which they could have charged this defendant prior to 2002. I mean, they not only didn't have probable cause to arrest him for this case, but they didn't even have any investigatory leads that would have led to this James Fletcher prior to 2002.

In their motion under Paragraph 20, they say the State elicited testimony at trial that the name

Fletcher and James Fletcher came up in the course of the investigation, and that the source of this information was Terry Rogers, who after fourteen years and due to the State's delay was not available at trial.

I don't understand the connection of the second sentence to the first sentence here. But I think that it's misleading, because the name James Fletcher was not known to the police until 2002. If they're trying to say it was known before that, they're absolutely wrong, and they have no basis with which to make that statement to this Court.

In Paragraph 23 they talk about an eyewitness being dead in the Gulley case and compare that to Mr. Rogers not being present at the trial. And we did attempt to find Mr. Rogers and perhaps use him as a witness in this case. But nothing prevented them from doing the same thing, Judge. He wasn't dead, that anyone knows of. If they thought he was such a key witness to their defense, no one was stopping them from finding him, either.

And I don't think that they can complain we didn't call a witness. We called the witnesses we have and that we want to call. If they thought he could help them, they should have called him. Our calling him was

not a violation of this defendant's due process rights.

They say in that same paragraph the State elicited testify at trial that a witness identified Mr. Fletcher by name in connection to the event, but due to the delay he was not available. Well, they're wrong again. The State never elicited such testimony.

And it's curious that in that paragraph when they refer to the State elicited testimony, they don't refer to a page in the transcript that would support that assertion. That's because there is no such page in the transcript, because that testimony never was elicited. So that statement is a falsehood.

The concept of a defendant not being able to remember where he was and to prepare for an alibi is one of the considerations. But the courts have held, including the Lawson case that they have cited, has held that the assertion of inability to recall is insufficient to show actual and substantial prejudice.

But even if they were able to show actual and substantial prejudice, Judge, it's still a balancing process, and the reasonableness of the delay is to be judged against the substantial prejudice.

And in this case a man was killed and there were no leads. And, you know, I mean, there is not in

the record, nothing in the discovery, nothing in the trial testimony to indicate that anyone ever had any clue as to the identity of who the shooter was until Terry Rogers was arrested in 2002 and gave that information to the police. So the reasonableness of the delay is certainly explained.

The testimony of the defendant's wife, ex-wife about being in or near Memphis and being at a hotel on various occasions, they say the records would have established an alibi. But my recollection of her testimony was that she met the defendant at a motel and then he followed her back to where she was staying. So meeting someone in a hotel isn't going to mean there is records of that person being in a hotel.

But even so, inability by the witness to recall is insufficient to show actual and substantial prejudice.

I think the bottom line in this issue, Judge -- and again, we would submit that this was, is not a timely issue at this time. But that if it were a timely issue, it still should be denied, because in the overall reasonableness and in the interest of justice, the fact that it was a murder, the fact that the police did follow up any leads that they had, there was no bad

faith, there was no foot dragging on any law enforcement agency's part, that this motion should be denied.

THE COURT: Defense, you have the last word.

And would you please address the issue of the availability of Mr. Rogers or the unavailability?

MR. SALTIEL: In what respect, your Honor?

THE COURT: Why was he, is he, or why -- you conclude he is unavailable. Under what basis? There is a legal definition pursuant to case law of availability. And the Gulley case, you cited one of the arresting officers was dead, therefore he is unavailable.

In this particular case, you continue to use the phrase, "Mr. Rogers was unavailable." Please inform the Court why or how.

MR. SALTIEL: Okay.

I guess our first response is to the timing of the motion to dismiss.

Actually, this was a motion that was filed pre-trial. And at that time I believe the ruling by the Court was there was no prejudice shown. At the time there was no alibi witness. An alibi witness was discovered later, and at that time Mr. Rogers was available. We didn't know until trial exactly what the testimony of the alibi witness was going to be, and we

didn't know until trial that Mr. Rogers was going to be unavailable.

THE COURT: Can I stop you?

You said that this motion had been heard earlier?

MR. SALTIEL: It was filed with the Court earlier in front of Judge Garcia.

MS. O'CONNOR: I don't have a copy of a motion.

MR. SALTIEL: It's in the court file.

THE COURT: Could you give me one minute, please?

MR. SALTIEL: Sure.

THE COURT: I have a motion dated here September 30, 2002, Motion to Dismiss for Failure to Commence Prosecution Within a Reasonable Time. That was filed on behalf of Mr. Fletcher by Joseph Kennelly of the Public Defender's Office.

MS. O'CONNOR: I don't think that motion was ever heard, Judge, was it?

THE COURT: I don't know.

MR. SALTIEL: I know the State did file a response in that. And it was my understanding in talking to Mr. Kennelly that the judge did hear the

motion, and he denied it because they were unable to show prejudice at that time.

THE COURT: You're right, Counsel. On November 7, '02, it states here that Defense motion to dismiss arguments were heard, motion denied, and State tendered additional discovery.

Okay.

MR. SALTIEL: One of the points that the State brought up in her response was that the police couldn't have found Mr. Fletcher until 2002.

This does not seem to be the case. In 1990 they had the name Fletcher. Whether that was the first name, last name, they weren't sure. But they had the name Fletcher in '90.

Now, in 1990, the defendant James Fletcher was on parole in the Austin District which is where this incident occurred. Now, it would seem very logical they would be able to investigate people on parole with the name Fletcher who lived in the area. He wasn't running from the police. He would have been available to ask him.

In fact, the witnesses at the time were shown photos. We don't know photos of who. But you would assume if they had the name Fletcher and they had people

on parole in the area with the name Fletcher, those possibly could have been the photos they showed.

So if they were doing this with some of the witnesses, none of them identify him.

Furthermore, in 1995 they were able to come up with another suspect and put together a photo array. Just based on that basis, given the fact that Mr. Fletcher was on parole in the Austin District, and afterward he was in custody of the Illinois Department of Corrections, true, under an alias of Arnold Dixon, but they also had the name of James Fletcher associated with that name, they should have been able to find him if they were looking for him.

Now, as to the point of the statute of limitations and the seriousness of the crime, this is a serious crime, and that's why the delay is even more harmful, because we are talking about a murder case. The defendant was not able to properly put on the defense that he would have been able to put on had this case been brought, you know, ten years ago.

And I think the point of the statute of limitations doesn't really apply there, because I think the point of the statute of limitations is for people who are hiding out, evading law enforcement or cases

where they discovered new evidence. The statute of the limitations or lack of for the murder statute, I don't know for sure, but it shouldn't be the case it is for the State to take as long as they want to bring a case. Because that would put people at prejudice forever, that they could wait for no reason to bring a case for twenty years. After so much time, a person's ability to defend themselves against a serious charge is going to deteriorate, as it has in this case.

Now, with respect to Paragraph 20 of our motion, I just wanted to point out the point about the testimony that was elicited at trial of Fletcher and James Fletcher. The point of that paragraph is that that information came from Terry Rogers, and we were unavailable to cross-examine Terry Rogers. And that's why him being unavailable is significant. Because he was the source of that information and we couldn't cross-examine him.

And I think she also mentioned Paragraph 23, the State did elicit testimony that Mr. Fletcher, that the police had the name Fletcher, and that during the course of the investigation a witness gave the police the name James Fletcher. And although the cites are not in this brief, I know I cited it in the motion to, for a

new trial, and I could provide those cites for you if you'd like.

And in addition, from that information being elicited through the testimony of witnesses, it was also a point the State made in her closing as well.

Now, as far as the availability of Terry Rogers, our basis for him being unavailable is the fact that our investigators have been trying to locate him in the Chicagoland area and were unsuccessful. We came to the understanding that the police were also looking for him. He was, there was an open arrest warrant out for him for another incident that they were looking for him.

And I believe that this State had tried to subpoena him, and then at one point learned he may be in Mississippi somewhere, but the exact whereabouts were unknown. But they were trying to work with the authorities to try to locate Mr. Rogers.

And even if, you know, him being out of state, even if we were to locate a current address for him that is correct, there is no reason to believe that we would be able to force him to come to Illinois to be a witness in this case. It's more likely that the State with its resources would be the party that probably could do that, if anybody, at this time.

Now, to go back to our position that we were, that the defendant was caused prejudice with the alibi testimony. Her inability to remember the exact date is significant, and I don't think Lawson applies to this specific scenario. In Lawson and cases like Lawson the inability to remember was just in general. They just couldn't remember anything. They didn't have a specific alibi witness in mind. They were just, "I can't remember anything."

Whereas in Gulley, which is more on point, it was specifically an alibi testimony, alibi witness who they couldn't remember the specific date. And I think this situation is more analogous to that, that we did have a specific alibi witness who testified that Mr. Fletcher was out of the area in Memphis at the time. The problem was she just couldn't remember the exact date, only the general time frame. And after, you know, fifteen years, who could remember the exact date?

THE COURT: But when you read Gulley, if you look at Gulley under that issue of defense alibi on Page 3 of that opinion, it says to perfect an alibi, the defendant and his witness would be required to recall an uneventful two days back four years to negate the evidence presented by the State. Presuming a

defendant's innocence, it would take some unusual activity on the two relevant days to call attention to them to cause them to be recalled by the defendant or any of his alibi witnesses.

Didn't the alibi witness testify she recalled these days because it was at that time that her and Mr. Fletcher were breaking up, were ending their marriage and she had left?

MR. SALTIEL: She did testify that she remembered these -- I'll say meetings with the defendant at that time. And part of the problem is that there was more than one meeting. I believe there was testimony to an earlier meeting, and although we didn't probe it, I believe there were later meetings. There were actually several meetings. She remembers the meetings because of the break-up at the time.

But the fact there was more than one meeting and the fact there was fifteen years difference in her, you know, when she tried to recall which day was was what, could be very difficult to recall the specific day. She was able to give us a leeway of a couple of days.

But when it comes to an alibi defense, you know, I believe, you know, to be successful you have to

be very specific. You can't just say it was either this day or that. Probably have to be a certain day to be successful.

And -- well, and also that robbed us of the possibility of corroborating it with written documentary evidence which we might be able to get if this had been brought earlier.

So not only would the alibi defense, was her inability to recall, but also our inability to discovery documentary evidence and other evidence that would have helped corroborate our alibi.

And with Mr. Rogers, this was a person who is a key witness who was unavailable. He was a person who was actually a potential suspect as well, which may have had an effect on the jury learning there was another suspect and this potential suspect is a person that identified Mr. Fletcher.

And also the fact that in Roger's statements were used against him at trial.

All of this caused Mr. Fletcher prejudice.

And for those reasons we believe you should grant our motion to dismiss.

THE COURT: In regards to the motion to dismiss the indictment, the Defense has brought out the

fact that the motion to dismiss the indictment for failure to commence prosecution was heard by Judge Garcia, filed on September 30, '02. It was heard by Judge Garcia on November 7, '02, and dismissed because there was no prejudice shown.

After the trial, the Defense right at the conclusion of the trial filed a new motion to dismiss, and now their argument is basically they have established through the testimony that there was actual prejudice.

In regards to the procedure that Lawson and Gulley established for actual prejudice, I'll first state that it seems obvious now that the first motion to dismiss was properly filed in time.

The second motion here was after trial. I'll consider that a motion based on due process.

In regard to the Lawson test, it states that the first step of the test, the defendant must come forward with a clear showing of actual and substantial prejudice resulting from the complaint of delay by the State. And they state that 51 months delay in Nichols was considered great suspicion and a presumption that the delay was prejudicial.

And in regard to the prejudicial aspect of

that, I believe there's basically two aspects to the Defense argument. One is that they were not able to perfect an alibi defense, and, two, that a witness was unavailable.

As I pointed out earlier, in Gulley the unavailability of a witness was based on a death of a witness.

I also asked the Defense a question in regards to whether or not this was an uneventful period of time based on the defendant's wife's testimony that she remembers specifically the day, for lack of a better term, their marriage broke up. But the Defense has argued that even though it was the same time period, it wasn't specifically the day in question.

So in regards to the prejudice shown, I believe there was prejudice shown based on the delay. I don't believe there was prejudice shown based on the unavailability.

And I'm saying this, my reading of case law with regards to the unavailability of witnesses is he could not been brought forward for any purpose. Deceased, incompetency, statements like that.

In this particular case, both sides had an opportunity to bring in any other witnesses they wanted.

The fact that Mr. Rogers could not be found, I don't believe that fits the criteria for determining a witness is unavailable.

It should also be pointed out that even though the State tried to find him and the Defense tried to find him, there were no continuances from either side, that I recall, specifically asking that he was a necessary witness for trial. And neither side asked for a continuance solely to bring in Mr. Rogers as a witness.

Go ahead.

MR. SALTIEL: I believe that is incorrect. I remember specifically that the State had Friend and Cooper ready to go and asked a continuance specifically for the reason of bringing in Rogers.

THE COURT: And after that they decided to go without. The Defense never asked. That is their decision. That was their decision to go without him. The Defense never asked, nor did anyone file a motion here to be tendered or submitted to another jurisdiction of a necessary witness in a criminal matter.

Therefore, it is this Court's opinion, humble opinion, that Mr. Rogers does not fit the criteria of unavailability pursuant to case law.

Having said that, I now must move in regard to the second element of the test, and that is -- and both sides argued basically the Lawson test. I mean by that, what I mean by that, after the first element is normally shown, the burden shifts to the State.

I'm shifting that burden to the State to show the reasonableness, if not the necessity for the delay.

In this particular case, a lot of the arguments being brought forward today are not necessarily part of the trial transcript. These are pre-trial or pre-trial issues, or pre-trial events, and basically most of it is an event that occurred before 2002.

I'll briefly go through those.

This event occurred in 1990. After a police investigation, from what I can tell, they had the name Fletcher.

In 1995, this incident, this armed robbery murder was considered a cold case. It was re-investigated by two detectives. And they then -- and this is the first time the Court has become aware -- the name Clinton Fletcher came up. And they followed that lead, interviewed Mr. Cooper, the eyewitness, again who did not identify him as the participant.

In 1995, that was the issue or the facts before the Court.

In 2002, at the time that this Mr. Rogers was arrested, he gave statements to the police implicating Mr. Fletcher as the individual involved.

What occurs at that time is that, from what I can understand, there is a police investigation, once again concentrating on Mr. Fletcher. During the course of that investigation, sufficient evidence was established to charge him.

I believe it's important in these particular matters in regards to Gulley and even Lawson that you're dealing with a suppressed indictment, which means that the State knew who the defendant was from the beginning of the incident and that they did not charge that individual. I believe in Gulley it was a 51 month delay that the indictment was handed down. The State had asked to have it suppressed for the secrecy of the continuing investigation. The Court said that is a valid reason, but 51 months is too long.

So in regard to the reasonableness of the delay and the necessity for the delay, I don't feel that the State could have, based on the information they had in '90 or '95, arrested or charged Mr. Fletcher in 2002

when that information was made available at that time they had the information needed to arrest the Mr. Fletcher, and that is what they did, after there was a photo array and a lineup.

So in regards to the second prong of that test, I believe there was a reasonableness and a necessity for the delay.

And with the reasonableness of that delay, the Court now moves to the third factor had in Lawson. I must make a determination based on the balancing of the interest of the defendant and the public.

The factors the Court should consider are the length of delay and the seriousness of the crime.

In this particular case the length of the delay was substantial, from 1990 to 2002. However, the delay that I would say could be attributable to the State did not occur until after 2002 when there was sufficient evidence to establish probable cause for the arrest of Mr. Fletcher.

Therefore, I believe the delay -- I'm sorry. I believe the State, the delay here, even though lengthy was reasonable. You cannot arrest somebody without probable cause. That is the law in the State of Illinois. They did not have the probable cause to begin

with.

And the final aspect is the seriousness of the crime.

In regards to the seriousness of the crime, this is a crime that occurred on the streets of Chicago in the middle of the day, from what I recall. From what I know, this was an armed robbery murder.

Therefore, I believe that based on the Lawson factors, the test that the Court enunciated, and based on Gulley, that the motion to dismiss the indictment for failure to commence prosecution within a reasonable time will be denied.

Now, that leaves us with the motion for a new trial.

It's broken down into four parts. You want to take them one at a time or all four together?

MR. SALTIEL: However the Court would prefer.

THE COURT: I think there are four specific issues. I think it might be better to do them one at a time, because you'll get a response to each one.

State, do you understand that?

MS. O'CONNOR: I do.

THE COURT: The first issue is labeled: The Court erred by allowing witnesses to testify about

information obtained from out-of-court statements made by Terry Rogers.

MR. SALTIEL: We have previously just discussed at, the time of the incident in December of '90, Terry Rogers gave a statement to the police saying that he heard one of the suspects say to the other suspect, "Come on, Fletcher, let's go," and in essence identifying Fletcher as one of the suspects.

And then in 2002, during a police interrogation, he identified Mr. Fletcher by name, "The guy you are looking for for the '90 incident is Jimmy Fletcher. He came up to me and told me what happened. I had known him before the incident, and he's the guy you are looking for for this."

Now, these two statements, the first one, you know, is double hearsay, and the last one is just hearsay. That's an issue. And we believe it was in error for those statements to come in on the hearsay grounds.

However, I think the more serious violation here, and the more serious error was the 6th Amendment violation of Mr. Fletcher's right.

6th Amendment is very clear. You have the right to cross-examine those who bring evidence against

you. In this case, Mr. Fletcher was not able to cross-examine Terry Rogers. And I think this goes exactly on point to what the U.S. Supreme Court had decided in the Crawford case, and that statements made by declarants in a police interview are testimonial and inadmissible if the defendant has not had an opportunity to cross-examine that declarant.

In this case Mr. Fletcher never had an opportunity to cross-examine Mr. Rogers. Now, the problem that arises with this is that Mr. Rogers has a lot of credibility issues. He has a tremendously long rap sheet, over fifty arrests, I believe; I think five or six felony convictions in there. He has a long criminal history.

Not only does he have that background, but he appears to have been at one point a suspect in the case, and the police went to interview him because they thought he might have been involved. And only at that time does he identify James Fletcher as, "No, don't look at me, go look for James Fletcher." Paraphrasing, of course.

In addition, no one else can corroborate his 1990 statement. He said he heard one suspect yell to the other suspect "Fletcher." We heard from the --

THE COURT: But you are not saying that detective testified to that entire statement, are you?

MR. SALTIEL: No, no. What I'm addressing, if Mr. Rogers were available, these are credibility issues we could have attacked him to attack the credibility of Mr. Rogers. That would have been the point of calling him.

You know, the 1990 statement that he supposedly heard, no one else heard that. You have testimony from the other two witnesses who presumably are closer to the suspect than Mr. Rogers never heard any such statement.

All these issues go to Mr. Rogers' credibility, and this is something we would have been able to bring out at trial and the jury would have been able to consider.

Now, what happened at trial is Mr. Rogers, of course, didn't testify, and the police or the detectives, what they testified to is that at one point they have the name Fletcher, and later one one of the witnesses had given them the name James Fletcher.

Now, the problem with the evidence coming in that way is now there's this inference that the police had a reason to be looking for this guy, that they were

looking for this guy for fifteen years. They had the name. You know, it was, you know, he was running away from the police, or whatever it was. He was unavailable to the police to stand trial.

Also, it brings credibility to that identification. Essentially, it was an identification coming through the police officer. But because it came through -- excuse me. Because it came through the detectives, we were unable to attack it. The detective has no credibility issues. He just says, "We're looking for a guy named Fletcher," and the jury believes that, and they have no reason to doubt it.

So, you know, if those statements came from Mr. Rogers, you have all these credibility issues with Mr. Rogers as it brings into doubt the statements he's giving in court.

And because these statements came in, I think the Crawford case is very clear that that was a violation of Mr. Fletcher's 6th Amendment right, and therefore we ask for on that basis alone a new trial.

THE COURT: But in the Crawford case, wasn't that a case where an officer testified to the specifics concerning a statement .

I recall Detective Bogucki, didn't he testify

that he interviewed a witness, and then began looking for somebody? He never testified to the substance of that witness's statement.

MR. SALTIEL: But the substance of the statement was the identification of Fletcher, and that was brought out through his testimony.

THE COURT: But what I'm saying, didn't Crawford specifically address a detective getting up on the stand and testifying to the entirety or almost the entire substance of an individual's statement? Not in regard to what is admissible as the detective can testify, "I talked to somebody," and, "After talking to that individual, what did you do next in the course of your investigation." I think there is a line there.

I'm trying to ask you, are you saying that Crawford dealt with this particular type of case, or did Crawford deal with a specific statement made by an officer?

MR. SALTIEL: The distinction I was trying to make with Crawford is that I believe when the Court ruled that at this, at trial they were sort of taking it as a hearsay issue. And how do you make that, you know, clean up the problems with hearsay but still allow the officer to give information that he discovered during

the course of the information? I think Crawford specifically differentiates the hearsay issue by addressing the 6th Amendment issue directly and saying any statements that were, any testimonial statements given by someone cannot be used against that person unless that person has a right to cross-examine them.

And in this case, Mr. Fletcher never had that right. He never had that opportunity.

THE COURT: Okay. All right.

State, your response to issue No. 1?

MS. O'CONNOR: Judge, my response is never once was any type of hearsay statement elicited on the part of any single witness in this trial with regards to what Terry Rogers may have said at any time during this investigation. Clearly, that's obvious from the transcript.

And I would direct the Court's attention to Detective Bogucki's transcript as the Defense did in their motion between Page 180 and 186 on February 23, 2005 when Detective Bogucki was testifying. It's a classic testimony under the course of investigation theory that the Court has already mentioned.

And that's well established in Illinois that that is permissible, that a detective can say he talked

to someone, and after talking to that person he was then looking for another person as a suspect. No defense attorney or defendant likes that case law in Illinois. They hate it. But it's the state of the law in Illinois, and therefore the Court must follow it.

And that's why this Court did allow that testimony.

And never once was a hearsay statement requested of the detective or elicited or suggested in any way. Does the jury draw any conclusions? We don't know. We didn't ask the jury if they did.

But whether they do or not is really irrelevant, because the current state of the case law in Illinois law is under course of investigation this type of testimony comes in.

This Court actually struck some of the testimony that was elicited from Bogucki even though it didn't elicit a hearsay statement of Terry Rogers, and we objected to that. But that was the Court's ruling.

So our position is that this Court erred on the side of fairness to this defendant, but did follow the basic concept under the cases that stands for the concept of course of police investigation.

Crawford doesn't apply because never were any

hearsay statements presented to this jury. Crawford only applies to hearsay. There was no hearsay.

That's the bottom line.

That's my response.

THE COURT: Defense, you have the final say.

MR. SALTIEL: At first, as to the point as to the effect on the jury, I think it did have a very profound effect on the jury. Because not only did this information come through the detective's testimony, it was something argued by the State in its opening and its closing. This was a point they reiterated to the jury, that the police had this name, they were looking for this person.

Now, as far as to the specifics of the statement itself and the course of the investigation theory, the statement in 2002 by Mr. Rogers was essentially an identification. The detective testified at trial, he was provided, he was provided the name of Fletcher by one of the witnesses. That is the statement itself. And the fact that it comes in, that he doesn't say, "Someone specifically told me it was Fletcher," shouldn't cure, shouldn't cure the issue on the right to cross-examine on a defect.

Specifically, what this leads us to is that

any time you want to avoid being able to cross-examine someone, you just remove, you know, where that statement came from and you apply this information. That may protect the hearsay issue, I believe, the course of the investigation theory. It does not protect the 6th Amendment problems. I think that is what Crawford was getting at, and I think that Crawford is going to trump an Illinois case, since it's a constitutional issue, and this was a case that was recently decided by the Supreme Court.

Just in short, I think, you know, the statements that the detective said Fletcher, and, you know, they had the information of Fletcher, and James Fletcher cannot be taken as any other way as being testimony that came from Terry Rogers. There was no other source for it. It was his statement given to the police during an interrogation.

And so those statements were improper to come because Mr. Fletcher never had the opportunity to cross-examine him.

THE COURT: In regards to the issue of Detective Bogucki and the limited testimony that this Court allowed in, I believe it was my ruling that he was not to get into any substance of Mr. Rogers' statements

to him or to any other officer, be it back in 1990, 1995, or 2002.

The detective, I believe, testified what happened during the course of this investigation, that in 1990, or 1995 the police were looking for a man by the name of Fletcher. In 2002 they were looking for a man by the name of James Fletcher. That was after the State elicited testimony establishing the course of his investigation.

Now, the Defense argues that there was a statement of identification. A statement of identification is that the defendant is, that a witness identifies the defendant as the person that perpetrated a crime. The officer never testified to that. He never testified that Mr. Rogers identified Mr. Fletcher as the shooter in this case or as the participant in the armed robbery. That testimony never came out. I believe the Court in my best efforts attempted to limit any potential problem with this issue.

And in regards to Crawford vs. Washington, in this Court's reading of that case, the U.S. Supreme Court struck down where an officer gets on the stand and basically testifies to the events that were given to him by a third party.

That wasn't the case here. Officer, or Detective Bogucki did not testify to this substance of what Mr. Rogers may or may not have told him. He testified limiting that after a conversation with a witness he was looking, or the police were looking for an individual named Fletcher, and later by the name of James Fletcher.

I think the Defense says that the inference is that Mr. Rogers identified him as the shooter. But that wasn't the testimony.

And I can't tell as a judge if that had or had not had a profound effect on the jury. I can't say that the statement by Officer or Detective Bogucki that they were looking for Fletcher impacted the jury's decision, or that they were looking for James Fletcher impacted the jury's decision.

What I can say is that in regards to the testimony of Detective Bogucki, this Court was adamant we were going to stay within the confines of the Illinois case laws that say that the officer can testify to his course of conduct, and I was not going to allow this officer or any officer to testify as to statements made by a third party to him to get in substantive evidence.

Therefore, I believe the Court was correct in following the Illinois law and the tenets established in Crawford vs. Washington.

Therefore, in regards to the first issue, your motion based on that will be denied.

Now we have the second issue, the Court erred by not allowing (inaudible) Gordon to rebut the State's witness, Detective Bogucki.

MR. SALTIEL: At the time the defendant was arrested April 2002, he was brought to court. He was arrested. He had a preliminary hearing, and there was an issue came up over his representation.

At that time the defendant identified the name of a private attorney, but because she was not present at the time, the judge asked the public defender to represent him, which they did. And at that time, they entered their demand for trial, and they conducted their preliminary examination.

After that point, the next day, there was an in-person lineup. And the judge at the preliminary examination specifically requested the State inform the public defender when and where that lineup would be.

Now, at this lineup that occurred two days later on April 20, 2002, the attorney representing

Mr. Fletcher at that time, a Miss Gordon, came to defend him during the course of the lineup, and at that time she was not allowed into the witness viewing room.

THE COURT: Can I -- at that particular point in time -- these are some facts that were not presented at trial -- was there an appearance filed on her behalf?

MR. SALTIEL: No. The public defender filed the appearance at the time, because she was not available to come to court that day, so the judge asked that the public defender file the appearance.

THE COURT: So the appearance of record was from the Public Defender's Office?

MR. SALTIEL: Yes.

THE COURT: Go ahead.

MR. SALTIEL: So she came, identified herself as Mr. Fletcher's attorney and was there to represent her during the course of the lineup.

During the course of the lineup she was not allowed into the witness viewing room. She was put in the room with the suspect, so she was not allowed to see the interaction between the police and the witnesses and not allowed to view the procedures of the identification process.

We believe at that time that Mr. Fletcher had

a right to have his attorney present at the lineup because the adversarial process had begun, because there was an appearance made, and because there was a trial demand made, and the fact that the attorney was not allowed into the witness viewing room at the time is a violation of his rights.

Now, prior to trial, we did -- we did file a motion on this issue, and the motion was withdrawn, with the understanding that the facts that occurred that day we would be allowed to argue.

MS. O'CONNOR: I object to that statement, Judge.

THE COURT: Overruled.

MS. O'CONNOR: That's not in any records of testimony.

THE COURT: I believe there were discussions that the facts concerning the lineup would be admissible at trial.

Go ahead.

MR. SALTIEL: At trial, Detective Bogucki made the statement that people, that the accused person -- or excuse me, attorneys for the accused persons are never allowed into the viewing room during the lineup procedure.

Now, we believe that that was an incredible statement. We believe that there are instances where the attorney would be allowed into a viewing room, specifically in the case where the adversarial process had begun, and we believe that this was such a case.

Now, to rebut this statement at trial, we tried to elicit testimony from Miss Gordon, the attorney, at the time that she should have been allowed into the witness room, and that attorneys are allowed into the witness room if the adversarial process had begun, and, of course, she was not allowed to testify in that regard to rebut the detective's earlier testimony. We believe it was improper to strike her testimony and her testimony should have been allowed.

So for that reason we'd ask the Court to grant our motion for a new trial.

MS. O'CONNOR: Judge, our response is that such testimony by an attorney would be inadmissible at a trial.

Testimony about whether an adversarial process had begun and whether she should have been allowed into the viewing room with the witnesses isn't an appropriate subject for a trier of fact to consider. That is a subject of a pre-trial motion and totally irrelevant to

the fact-finder in determining guilt or not guilt. That was our main argument with regard to this portion of this post-trial motion.

If this issue had been heard before trial, the main issue would have been had the adversarial process begun, and Counsel states that it had. We, of course, would state that it had not begun.

But that is a factual issue that has to be determined, and that is an issue of law, not an issue of fact for a jury. He made a statement that with regards to it had been determined somehow that all these issues would be brought out at trial, and that is absolutely incorrect. There never was such an agreement, because that would go against the way such issues are to be decided, and this Court certainly would not have allowed that, nor would we have agreed to it.

And I'm not really sure if I should even address whether the adversarial process had begun, because I don't believe that this part of this motion for a new trial -- I mean, I think it should be stricken as inappropriate at this time.

But I'll address it if you want me to.

THE COURT: You may.

MS. O'CONNOR: There is case law on this

issue, as you know, Judge, in the Clarence Hayes (phonetic) case, cited at 139 Ill.2d, 89, there is a long discussion as to when a person's 6th Amendment right to counsel attaches. And obviously, it's only after adversarial judicial preliminary criminal proceedings have initiated which by way of a formal charge, preliminary hearing, indictment, information, or arraignment.

Counsel cites the Kirby case in his post-trial motion. And that case, the Kirby case is cited in Hayes.

In this case, none of those adversarial proceedings had been initiated. The fact that he was brought in front of a judge doesn't mean the adversarial proceedings had begun or that a court told the state's attorney to notify the assistant public defender that his client was going to be standing in a lineup. That doesn't mean the adversarial process had begun.

In fact, this investigation was, the police were in the middle of the investigation. They were bringing the eyewitnesses to look at the lineup. No charges had been approved. There was no preliminary hearing. It wasn't even determined yet if charges had been filed, so --

THE COURT: So why were they in front of a Judge on April 18?

MS. O'CONNOR: Because a warrant had been issued. And he was brought, apparently, to a judge because he had been arrested on a warrant.

THE COURT: So he was brought in from the Illinois Department of Corrections and a judge in this building --

MS. O'CONNOR: Does the court file reflect that he was in front of a judge on the date that you just mentioned?

THE COURT: The first entry in my common law record is June 27, 2002.

MR. SALTIEL: He was before a judge on April 18th, and we do have the transcript.

THE COURT: May I see that?

MR. SALTIEL: I'm not sure if I have them with me, though.

THE COURT: I might ask the Defense at this time, you state on April 18th, a preliminary examination against Mr. Fletcher was filed?

MR. SALTIEL: It was.

THE COURT: Is that the execution of the arrest warrant?

MR. SALTIEL: It was an appearance -- well, there was an appearance, notice of representation, and demand for trial filed by the state's attorney on 4-18.

THE COURT: On 4-18?

MS. O'CONNOR: It was in front of Judge Sheehan.

And Judge, what it was, basically was for bond purposes. No bond order was issued. And the defendant was remanded to Cook County Jail so the police could conduct the lineups.

I don't know what Counsel means by preliminary examination. I'm not aware of that as any type of legal proceedings. There was no preliminary hearing. There never was a preliminary hearing in this case. There was no evidence taken at that time. He was simply appearing there so he could be remanded to the jail so the police could conduct the lineups, because they couldn't do it at the Illinois Department of Corrections.

THE COURT: And either side, on April 18, '02, did Judge Sheehan find probable cause to detain on the charge before the court?

MS. O'CONNOR: Judge, I don't have a transcript of that date.

MR. SALTIEL: I don't have a transcript with

me.

MS. O'CONNOR: Could it be reflected on the municipal file?

THE COURT: There is not a municipal file on here because of the indictment, and because he came from IDOC.

MS. O'CONNOR: Well, I would submit even if there was a finding of probable cause to detain, that that doesn't click in the 6th Amendment right to counsel. Because it's when there is adversarial judicial criminal hearings.

And the Kirby case lists those legal proceedings, Judge, and it clearly does not include a Gerstein-type situation hearing. It's formal charge, preliminary hearing, indictment, information, or arraignment. And the defendant clearly was in custody on a twenty-five year sentence where he was in custody anyway.

I don't believe that that -- in fact, I would submit that there wasn't a finding of probable cause to detain because he was under a twenty-five year sentence with release not in the near future, and this procedure was on the warrant, so he can could be remanded to the Cook County Jail, and that is what my file reflects. It

says no bond, remand to Cook County Jail.

But if there was a finding of probable cause to detain, Judge, again, we submit that that is not the type of adversarial proceeding that would initiate the 6th Amendment right to counsel. He hasn't been charged. The investigation was still in progress. And in that situation, the attorney doesn't have a right to be with the witnesses in the viewing room.

And I mean, I don't think Detective Bogucki had to allow her to sit in with the defendant either. He could have denied her total access to any part of that lineup.

THE COURT: Defense?

MS. O'CONNOR: Judge, I just wanted to state that this attorney was allowed to testify about with happened at that police station, and their motion says that she wasn't, that she wasn't allowed to rebut Detective Bogucki.

But again, that is not the province of the jury. That issue isn't one that a jury could consider, or even be confronted with.

THE COURT: The issue of illegality of a lineup or the suggestiveness?

MS. O'CONNOR: The fact that the attorney

wasn't allowed to be in the viewing room.

Certainly, you can always argue suggestiveness based on the makeup of it.

But these legal issues are not issues for a jury to decide.

THE COURT: Okay.

Defense?

MR. SALTIEL: I think one of the points at trial that Miss Gordon was attempting to make is that she did not -- she believed that the lineup was suggestive.

And not only that she believed that the lineup was suggestive, it was a statement by the detective that the police procedure was legal, and that statement was out there. And that we should have been given the opportunity to rebut that statement, that that procedure was proper.

Because, clearly, we didn't think it was proper. And once that statement was out there, you know, it was out there in front of the jury, and we should have been given an opportunity to rebut that.

THE COURT: Well, here's what I'm going to do with this issue, unfortunately. I don't know what Paragraph 10 means in regards to the statement filed a

preliminary examination on April 18, 2002. And in regards to the statements of Detective Bogucki, that attorneys for accused persons are never allowed to the witness viewing room during a (inaudible) lineup.

Do you have that specific statement on Page 210, February 23rd, handy?

MR. SALTIEL: I can get that for you, I believe.

MR. HILL: Your Honor, would it be helpful for us to get the transcript over here?

THE COURT: That's what I'm sort of geared towards.

MS. O'CONNOR: What are you asking for? A statement of who?

THE COURT: Bogucki, in his testimony that attorneys are never allowed in there.

MS. O'CONNOR: Is that -- is that on cross-examination asked by the defense attorney?

THE COURT: I don't know. I have a question mark here, 2-23-05, Page 210.

MR. SALTIEL: This was a question asked by the State. And the question they asked was, "Are attorneys ever allowed in the area where the witnesses are viewing the lineup"?

Answer: Not in Area 5. They are not.

THE COURT: Okay.

MS. O'CONNOR: That was on re-direct.

THE COURT: That was on re-direct, right.

MS. O'CONNOR: That was on re-direct.

THE COURT: Okay.

MS. O'CONNOR: And I think we objected to Counsel asking Bogucki the questions, the legality about it.

THE COURT: The Court's position is that there was a motion to exclude the lineup identification that was later withdrawn. During the course of the pre-trial or, before this Court.

I believe that does not prevent the Defense from arguing that the lineups were improper, unfair, and suggestive, in the sense that only -- let's say out of five people only one individual was wearing a white shirt. I believe that that was the basis for Miss Gordon's testimony. Not to render a legal opinion as to whether or not it was a legal lineup.

I believe we even had a sidebar at that time, and this Court said she can testify to what she observed and her conclusion that it was suggestive. He was the only one with a certain kind of hair, the only one that

was over six foot, that's her opinion. Okay? Even though she is an attorney.

Her conclusion, legal conclusion that the lineup was unfair was not admissible. And I think this Court was able to stick to that procedure.

However, before I make my final ruling on this, I would like to see the April 18, 2002 transcript.

I'm assuming it's not too lengthy?

MR. SALTIEL: Four or five pages.

THE COURT: Could you call over and have them FAX it over here?

MR. SALTIEL: If you call over -- if you give us a number?

(Whereupon the above-entitled cause was passed and later recalled, after which the following proceedings were had:)

THE CLERK: James Fletcher.

THE COURT: Both sides had an opportunity to look at the transcript dated April 18, 2004?

MS. O'CONNOR: Yes.

MR. SALTIEL: Yes.

THE COURT: All right.

Defense, your argument is based on the transcript?

MR. SALTIEL: First -- and before I get to the transcript, I just wanted to address a point that was raised by the State in respect to the Hayes case when the right to counsel attaches.

I do not believe the Hayes case, the facts in there are directly on point in the event that Counsel gave of when the right attaches were merely examples of instances where the right to counsel to attach would start. I don't believe that was an exclusive list.

I believe the standard is still that when adversarial proceedings have begun, that's when the right to counsel attaches.

Now, I think in this case, you can't just look at one hearing. You have to look at what the State was doing. The State was proceeding against Mr. Fletcher starting in February. February is when they did the identification for Mr. Rogers.

Then they got a subsequent identification or an attempt to identify from Mr. Cooper. Then they proceeded to talk to Mr. Fletcher after interviewing Mr. Fletcher. Then they talk to Miss Friend and got an identification from Miss Friend. And then they went to

seek an arrest warrant. And they had done this all prior to April of '02.

And the reason why I think this case is a little bit different than the case law at hand is that we do have a little bit of gray area, because he was already incarcerated by the Illinois Department of Corrections. So they could delay doing certain things because he wasn't going anywhere, and he was available the entire time.

I think clearly at that time the State had interviewed all the witnesses, had identifications at that time, and decided to pursue an arrest warrant. They decided to pursue Mr. Fletcher for murder, and at that time, adversarial proceedings had begun.

And at the April 18th hearing, at that time not only did the public defender enter an appearance, but that's when the clock started ticking for his demand for trial.

There is not many more things that can go on to show that the State was proceeding against Mr. Fletcher.

THE COURT: Counsel, I don't believe there was a demand for trial on April 18.

MR. SALTIEL: I believe that was filed with

the appearance, and I also I believe that was when the issue of the speedy trial came up, prior to this trial, they were calculating from that date.

THE COURT: State, your response?

MS. O'CONNOR: My response is, Judge, that as case law does say that the government has had to have committed itself to prosecution for the adversarial level to require the assistance of counsel under the 6th Amendment.

And the case law also is clear under, and that the government commitment to prosecution is talked about in the Kirby case, and the case, the Hayes case, Clarence Hayes cited at 139 Ill.2d, 89, and the Appellate Court case of Illinois by the name of Jose Costilla, C-o-s-t-i-l-l-a, cited at 240 Ill.App.3d, 72, both stand for the proposition that obtaining an arrest warrant does not start the 6th Amendment right to counsel, that that does not rise to the level of adversarial proceedings requiring an attorney to be present.

In this case, Judge, it's maybe you could say slightly different than other cases. But it's not really different. The only difference is the custodial situation of the defendant. An arrest warrant is

obtained. And the case law is clear that that is not enough to kick in the right.

The reason the defendant was brought to Branch 66 was -- and I think that the transcript bears this out -- is that it was merely for what you might call housekeeping or administrative purposes, so that his incarceration could be transferred to Cook County, so that the police could run the lineups. If he hadn't been in custody and he had been arrested on a warrant, he wouldn't have had to go to Cook County Jail, because the lineups, he could have gone straight to the police station where the lineups could have been conducted.

But in this situation, the people from IDOC could not bring him to Area 5 and stay there with him for lineups. They had to bring him there. He had to go to court and then transferred to Cook County.

And the transcript, clearly no facts of the case are brought to the attention of the Court. There is no Gerstein hearing. There is no type of judicial proceedings other than to transfer his custody.

He was already under a sentence. He was already in custody.

I know Judge Sheehan said there was no bond in this case. But really that has no effect on it, because

he was under a sentence of IDOC anyway.

So, you know, he couldn't have been released from jail whether Judge Sheehan said no bond or not.

This clearly wasn't a Gerstein hearing. And our position is that, again, it was housekeeping, slash, administrative so that his custodial situation could allow for the lineups.

Under the case law, arrest warrants aren't enough to kick in the adversarial proceeding.

So we would submit that that 6th Amendment right had not kicked in, and there was no violation of his rights by conducting a lineup without allowing an attorney to go in.

And the attorney that filed the appearance on April 18 was the Public Defender. They did file an appearance. There was a demand for a preliminary hearing.

But really, that is a hollow demand, Judge, because the defendant hadn't been charged. There was no preliminary complaint filed. There were no charges approved. There was nothing to be heard. The case was still in the midst of investigation.

And it was only after the investigation was complete and that charges were approved would any type

of adversarial process begin. And that hasn't clearly -- clearly, that hadn't begun.

So that is our position, Judge.

THE COURT: One moment.

Defense, I'll give you a response.

MR. SALTIEL: Judge, to verify some factual issues, I believe the arrest warrant was issued in March, and actually executed on April 18, and no -- to explain the terminology used in the motion of preliminary examination, I believe that came from what I guess is titled a Complaint for Preliminary Examination was filed by the State on April 18 where he was charged with the offense of first degree murder.

As far as the case law is concerned, our argument isn't that he was arrested and therefore the 6th Amendment right had attached. I think you have to look at the totality of the State's conduct in this case in they had been investigating him for some time and already had some identifiers, and they were proceeding against him at the time of the in-person lineup. And at that time is when the 6th Amendment right to counsel had attached.

THE COURT: Okay.

In regards to the issue Number 2, concerning

the testimony of Attorney J. Cunnion Gordon, there are a few issues here. I'll try to address them one by one.

First issue is whether or not his 6th Amendment right to an attorney started or was initiated on April 18.

It's true, I think the facts bear out that on April 18, detectives from the Chicago Police Department had James Fletcher transferred from the Illinois Department of Corrections into Cook County Jail to establish -- or the procedure at that time was to go before a judge and the Department of Corrections would transfer him or that person to the Cook County Jail upon the judge's order.

On this particular date, April 18, 2004, Mr. Fletcher appeared in court in Judge Sheehan's courtroom for the purposes of being transferred to Cook County Jail, and the further purpose to stand in a lineup, as elicited on Page 2 of that transcript.

At that time the public defender in the courtroom, Mr. Bernie Sarley, represented him, or filed an appearance on his behalf. The judge remanded Mr. Fletcher to Cook County Jail.

At that time Mr. Sarley informed the Court that Mr. Fletcher was represented by a private attorney

who was out of town, and he asked for a continuance for the lineup. The judge informed him that he did not have the authority to do that, and he further stated on Page 3, "At this time, sir, you have made of record that he has contacted private counsel. I understand she is out of town. I suggest before the lineup is conducted you notify her."

At that time state's attorney said, "We'll do that, Judge."

It was established her appearance was not on file, and that was correct. Mr. Sarley said, "We'll accept the appointment. We'll ask the Court to file our appearance," and that was granted, and the state's attorney informed the public defender in open court of the time and date of the lineup. And I think said it would happen to, on Saturday.

The facts presented in the motion established that the lineup was conducted on April 20, '02.

So the issue was whether that appearance before Judge Sheehan constituted an adversarial procedure.

Now, Defense argues that the procedure against the defendant in regards to this case began prior to that. But I think the case law we're talking about

legal proceedings, not investigation. Not the investigation. And by that I mean the interview of witnesses, the showing of photo arrays, whatever else entails any specific investigation. At that time in front of Judge Sheehan I don't believe the Government had made a commitment to prosecution. The only thing the Government had was through the police agency made a commitment to further an investigation.

And when you look at going over to the case cited by the Defense, People vs. Michael Swift, 91 Ill.App.3d, 361 on Page 4 of that opinion it stated that the Supreme Court has held that a pre-trial (inaudible) conducted after a suspect has been indicted is a critical stage in a criminal prosecution at which the 6th Amendment (inaudible) the accused to the presence of counsel.

It's my reading of the case law that at the time Mr. Fletcher appeared his right to counsel had not been invoked.

However, as the Defense mentioned, in the totality of the circumstances the Court did appoint him an attorney, and that cannot be denied based on the transcript presented today, and that attorney was an attorney from the Public Defender's Office. Mr. Bernie

Sarley at that time accepted appointment and was given information concerning a lineup.

At the same time, information was given to the Court that the defendant has a private attorney.

Now, two days later, on April 20, during the course of that lineup the private attorney appeared at the police station, and she was given the opportunity to observe the lineup. She was not given the opportunity to watch the witnesses' identification.

In regard to that issue, I believe she was given the opportunity to, that was necessary.

First off, I don't believe that 6th Amendment right had started or had kicked in, and I also believe as a matter of record she was not the attorney of record at that time.

Now, she had two days or one day to file an appearance. However, even though she did not file an appearance, I believe the detective had a duty to allow her to observe the lineup, and that she did. And she testified to that, that she was in the viewing room, that she was able to view the individuals presented in the lineup, that she was able to testify to the procedures of the lineup.

That's the reason I understand that the

Defense called her, to establish their theory that the lineup was suggestive, unfair, and improper. Not that it was illegal.

I believe that the questions asked in regard to Detective Bogucki on direct examination was whether or not it was illegal, which is not his theory, or his, (inaudible), should not be the basis of his testimony. That legality is up to the Court.

The fact is that Miss Gordon, Miss Gordon was able to testify to how she observed the lineup, the people involved in the lineup, the clothing of the individuals in the lineup, the discrepancy in size, the potential age, and the discrepancy in hairstyle. All of that facts were argued by the Defense in their closing argument to establish that even an eyewitness to this lineup, that eyewitness established that it was suggestive. That anyone -- basically anyone would have picked out Mr. Fletcher.

In regard to the testimony presented to the Court or presented to the jury, I don't feel that the jury latched on, if you use the proper term, to this conclusion by either Bogucki or the conclusion that the Court would not allow Miss Gordon of the legality of this.

So in regards to the complete issue before me, I don't believe the 6th Amendment right had attached. I believe, though, the Court did appoint an attorney. That attorney did not, the Public Defender's Office did not show up for the lineup. An attorney did show up for the lineup. The detective allowed that attorney to observe the lineup.

Based on -- not the witnesses aspect of the lineup, but the lineup that the defendant showed in, I believe that is sufficient, because the attorney is there, and at that time no 6th Amendment right had attached, but the detective did allow her to observe it.

She then came into court and testified what she observed which led the Defense to argue their theory that the lineup was suggestive.

Based on issue No. 3, the motion will be denied.

I'm sorry. Number 2.

For the record, what I'm going to do is put the transcript of the proceedings into the court file for further review.

Now, we move on to No. 3. This involves some attachments.

So, Defense, you may begin your argument.

Let me know when you are referring to one of the attachments.

MR. SALTIEL: Issue No. 3 has to do with the testimony of Miss Friend, who was one of the witnesses in 1990.

At trial she identified Mr. Fletcher as one of the suspects from the '90 incident. During cross-examination and trial, Miss Friend was asked about her pre-trial identification of the suspect in March of 2002. In March of 2002, Miss Friend was arrested for a parole violation. During that arrest, detectives investigating the 1990 incident questioned her, presented her with a photo array in which she identified Mr. Fletcher.

Now, during the trial, at cross-examination Defense Counsel had asked Miss Friend whether she had been released after identifying Mr. Fletcher in March of 2002. I believe her testimony was no, that she was not released, and she was, she went back to jail for a parole violation where she's been since.

Now, that --

THE COURT: Did she testify where she's been since?

MR. SALTIEL: I --

THE COURT: Or was that the inference that you felt was made to the jury?

MR. SALTIEL: I don't believe she said that in her testimony. All she said in her testimony was that she went back to jail.

I believe that the inference to the jury, and I believe this was a statement, a point that the State relied on later in her closing that she had no reason to lie because she had been back in jail, or as you recall, when she testified she was in her Cook County wardrobe, not in regular street clothes.

So I think there is an inference she's been in jail since this. We were unable to verify her statement at this time whether she had been sent back to jail. The rap sheet that was provided by the State's Attorney's Office that we had didn't indicate any arrest in March.

And I believe that -- I believe Exhibit C shows the rap sheet that we were provided prior to trial which does not show any activity in March of 2002.

Now, the difficulty with this is, and, actually, it's still unclear whether she went back to jail after that arrest, because the complete rap sheet appears to indicate there was no time served after that

arrest.

But so we were -- even with a complete rap sheet, it didn't seem to indicate that she was sent back. So it seemed to be that she had told a lie on the stand of her going back to jail for the parole violation.

The other problem with this is that we know that she hasn't been in jail continually since this arrest because of the trouble that the State had in bringing her as a witness to trial. They couldn't find her. They would have arrested her. She would, you know, tell her parole officer or something, all sorts of stories going around.

But for one reason or another, they don't find her until February of '05. When they found her, they arrested her, and put her in jail.

Now, we couldn't use that, or to impeach her with that information was subject to another ruling that the Court had made at trial that if we were to bring up any of those incidents where there was difficulty with her appearing in court, that the State would have been allowed to bring up what is highly prejudicial accusations by Miss Friend and helps substantiate allegations that her life was threatened.

And that posed us with a problem. Without the proper information to impeach her on her March 15, '02 incident whether she was arrested or not or whether she was sent back to jail for, sent back to jail for the parole violation left us with that problem, because no other way to impeach her with her criminal history other than to rely on her subsequent evading of the State. And because of the ruling and the prejudicial nature of what would happen if we tried to impeach her with that information, we chose not to.

So the only thing we could have relied on is information regarding her March 2002 arrest, which we didn't have at that time. And that was information we believed that the State should have provided to us.

Now, this also became a problem, because the State in its closing argument specifically referenced that the credibility of these witnesses was good, there was no reason to lie, and that they did come here on their own free will. And we believe that was simply incorrect based on the circumstances regarding Miss Friend.

And to reiterate the last point, which I think I shall -- not only did the State have the difficulty of bringing her to trial, they had to in fact arrest her

and place her in custody to insure her testimony at trial. And that clearly implicates that she wasn't there on her own free will, and there is clearly issues about her credibility, that even though we didn't bring out at trial, the State clearly knew that when they were making their statements that she was there, she had no reason to lie, she was there on her own free will.

For those reasons, we would ask that you grant us our motion for a new trial.

THE COURT: Hold on, Counsel.

You addressed Exhibit No. C, which is a two-page criminal history of Miss Friend.

But on Exhibit F, there's a second -- I think you referred to as an updated or completed rap sheet.

MR. SALTIEL: It was a more up-to-date rap sheet.

THE COURT: Did you receive both of those prior to trial?

MR. SALTIEL: No, Exhibit F was received after trial.

I had made a request of the State to update, because we were -- because we were, I guess perplexed at her testimony and wanted to verify what was going on. I asked for an updated rap sheet, and that was provided

after the conclusion of the trial.

THE COURT: Okay.

In regards to her having to be arrested and brought into court, you had knowledge of that?

MR. SALTIEL: Yes.

THE COURT: And you cross-examined her on that?

MR. SALTIEL: No. And that was the issue where you ruled that if we cross-examined her on that, the State would be allowed to --

THE COURT: Well, I think my ruling was you could bring that out, that she had been arrested, and the State would bring out, "Why did you not come to court"?

State, your response?

MS. O'CONNOR: With regards to that last issue, Judge, I think that, you know, Counsel made a tactical decision not to question her refusal to come to court and her having to be arrested, because he's aware of the reasons that she didn't come to court, and those were brought up during some pre-trial hearings and motions with regards to threats made to her and her family. And that is his decision.

And it certainly would be -- he'd be opening

the door once he started telling having her say how she had been arrested in order to testify. So I think that's a proper ruling.

I mean, that's -- once you open the door, I think we certainly should have been justified in asking her why she didn't come to court after being subpoenaed.

So we agree with the Court's ruling on that.

With regard to all the other issues, Counsel states that he didn't have an updated rap sheet. And I was looking through my file, and, Judge, I don't know when the last rap sheet was tendered prior to trial. I can't -- I actually, I don't have a transcript of every court date. I couldn't find a record of when the last rap sheet for Miss Friend was tendered to Counsel.

They said they had one, but that it didn't include a March of '02 arrest. So I'm not going sit here and say I gave them an updated one every time the case was up. This case had been pending for some time. I found receipts, signed receipts for discovery indicating they received Shenay Friend's rap sheet at a prior date. I think it was when perhaps Cathy Dillon was on the case.

But I would submit that discovery is an ongoing process, and if they wanted an updated rap sheet

-- I mean, they asked for one after trial. They could have asked for one before. I understand it's our obligation to keep discovery current. But -- and I simply cannot tell the Court if I tendered them anything on Shenay Friend prior to trial. I know that her history of arrests on this case was known to them for not appearing in court.

But I would submit that regarding the March of '02 arrest, they say it's not on their rap sheet that they have for her. But it's tendered in discovery in the detective supplemental police report, and I'll read from Page 6 of a nine-page supplemental police report, submitted by Detectives Shalk and Bogucki on May -- submitted to the police department by them on May 21, '02, and approved May 24, '02. It indicates -- and this is part of their history of their investigation -- says on 7 March, '02, at 6:40, Shenay Friend was arrested on a parole violation warrant. She was subsequently interviewed by detectives on 8 March, '02, at 1645 hours. She then related the following in summary. Then it gives a summary of what she told the police.

So certainly, they were aware that she had been arrested on a parole violation warrant. So, you know, if it wasn't on their rap sheet, you know, it's --

what does it matter? They knew about it.

So I don't think that they can complain that they didn't know about it when it was tendered in discovery.

And her direct examination during the trial, she, on Page 131, she told about her prior convictions, one for PCS in '03, and one for PCS with intent to deliver in 1998. Those were her two prior convictions. Nothing was withheld about her criminal history, Judge.

And their main contention seems to be this parole violation. And I don't know how they can claim they didn't know about it when it's in black and white in the supplemental police report. That is how the detectives talked to her, because she was arrested. Clearly, you know, everyone knew about it. So I don't think it's a discovery violation.

And when she answered on cross-examination about they said to her something in the nature of, "Well, once you were identified in a photo array they let you go, didn't they"? She was like, "No, I went back to prison." That addresses No. 15, the State didn't provide any evidence to indicate she was sent back to jail for parole violation. Well, her testimony is evidence.

And you know what? A criminal history is always to be tendered for felony convictions so a person can be impeached. And a city rap sheet does not generally, and also includes parole violations and when someone went back. I mean, in fact, they hardly ever indicate someone went back to prison on a parole violation, because that is not a new conviction. That is not something that would impeach her credibility, a finding that she went back on a parole violation.

They could have investigated this parole violation from Day 1. It was in the reports. I'll say no more about that.

On No. 16, Counsel says the State argued she had no reason to lie about her identification and she didn't make any deals. If any deals were made with witnesses, they would have been disclosed. I mean, I as an officer of the court, you know, tell the Court that no deals were made with her. I mean, they would have been disclosed. That clearly would have been a Brady violation if deals were made. They weren't.

And my argument that she had no reason to lie is certainly a reasonable inference from the evidence. She didn't know the defendant. She didn't know the guy that got killed. You know, there's basically an

unbiased witness, Judge, with no deals ever having been made.

So my argument that she had no reason to lie is not prejudicial to anyone, nor was it error to allow the State to argue that in opening close or rebuttal.

In Paragraph 16, Counsel states the State specifically reiterated Miss Friend's testimony that she had been in custody ever since March of '02. And I cite Page 72.

If you look at that transcript, there is no such statement by Miss Friend that she had been in custody ever since March of '02. That is another misstatement by the defendant. It's inaccurate, and it is untruthful that they would tell the Court that Miss Friend said that. She never said that.

If they want to infer that from the testimony, they can infer it.

But there is no evidence that the jury inferred it, and it was never told this jury by Miss Friend that she had been in custody since March of '02.

Did she come out in jail clothes? Yes, she did. But no one said they were prison clothes she had been wearing since March of '02.

Again, Counsel could have asked her, "Why are

you in Cook County Jail uniform"? And she would have said, "Because I got arrested for not coming to court to testify." But they chose not to do that. Again, a tactical decision.

So Page 16 is inaccurate. It's not justified by the transcript.

Paragraph 17, the State indicated to the jury Miss Friend had no motive to lie. Yes, we did. And implied she did came to court on her own free will. Who implied that? We never said that. It was not argued as a reasonable inference. Again, inaccurate, mis-statement of the argument. Their interpretation, free and easy interpretation that is inaccurate.

Repeated that argument four times? Where? Show me.

They cite Page -- transcript on closing argument, 72 to 74. I don't see it. I read all those pages. It never says that.

Was she released from custody after she testified? Eventually, yes, she was. Because she came and she did what she needed to do so that she wouldn't be in contempt of court. And she only did that because she was locked up. Because if she wasn't locked up, she wouldn't have been here to testify.

But Counsel again chose not to question her about that.

Was she told she'd be released if she testified? No. There is no evidence of that. Absolutely none. No deal. Nothing.

Because the State chose to ask the Court to dismiss the petition for contempt after she testified, does that mean a deal was made with her and she was promised she would go home if she testified? No. Was she ever said, "You'll go home if you testify in a certain way"? No. She simply was asked to come in and tell the truth.

In fact, prior to this trial, Judge, you know, I was prepared to have state's attorneys come in here and testify to what she said at the Grand Jury. I didn't even know what she was going to say. If I needed to impeach her with prior Grand Jury testimony and a handwritten statement, I would have. I didn't know what she was going to say. All I knew, she was going to testify.

Basically, they are saying that we suborned perjury in this.

And Paragraph 17 in the middle on Page 7, the State knew Miss Friend had incentives to give inaccurate

testimony. Where did they get that? That is an accusation that is totally unsupported, totally without good faith, and it's wrong. Who gave her incentives to give inaccurate testimony, knowing it was perjured testimony? How can they assert that without having any proof? It's totally unsupported.

Now, they didn't address today what is Page, Paragraph 19, and I don't know if they're standing on their written paragraph or if I'm just supposed to ignore that, or if they are -- I don't know.

But since it's there, I guess I'll address that.

We submit that there was no blown trial demand in this case. There was talk of the term running, and in December there was an agreement, basically, between the parties as to where we were on the term, and we were getting close to the end of 120 days.

In fact, we filed a motion to extend the term. But then we never asked for that extension. I mean, we didn't proceed -- we didn't pursue that any further. Because in December, on December 14, 2004, we did answer ready, and at that time it was approximately Day 116 over 120, and the Defense went by-agreement to February 7 for trial.

And their reasons for that are on the record, and it's clear it was by-agreement. If they're saying it wasn't now, then, you know, I mean, the court record bears out that that was a by-agreement date, and as I put on the record in February about the additional twenty-one days, when there's a by-agreement date during the last, when you're that close to the end of the term and there's a by-agreement date under the statute 1035 you get an additional twenty-one days.

So that on February 7 when they once again started their demand and the case went to 2-22, that is an additional fifteen days.

Even if we were at Day 120 over 120 on December 14, we still wouldn't have been at the end of the term on February 22 because of the additional twenty-one days.

So I think this Paragraph 19 is unsupported, and they never filed a motion to dismiss based on speedy trial prior to trial, which if they firmly believe that the demand, that the term had run, they certainly would have filed such a motion prior to this trial, which they didn't do. Which indicates that they don't really believe that, Judge.

And we don't believe that. And I think the

trial record supports the defendant's right to a speedy trial wasn't violated.

I have nothing more to respond to Paragraph 3 or Section 3.

THE COURT: Defense, once again, you have the last word.

MR. SALTIEL: With respect to this last paragraph, 19, we weren't arguing and we are not arguing there was a violation of the speedy trial statute.

The argument in Paragraph 19 is that the State was fully aware of the difficulties in getting Miss Friend to trial because they'd have to get an extra twenty-one days to do the trial just specifically to go out and find Miss Friend, that she was not willing to show up and testify at trial.

And I think the State makes my point very clearly that she was not a trustworthy witness. The State didn't even know what was going to come out of her mouth.

MS. O'CONNOR: Judge, I'm really sorry. Can I add one argument before he gets into his response?

THE COURT: Go ahead.

MS. O'CONNOR: With regards to their allegations that we committed a discovery violation with

regards to Miss Friend's going back to prison, even though it's in the report, they interviewed her and took copious notes on an interview that they had with her. Their investigator interviewed her and apparently had the opportunity to question her about anything and everything that they wanted to talk to her about.

So that was another opportunity they had that they could have inquired into that parole issue.

THE COURT: When did this occur?

MR. SALTIEL: Your Honor -- because this brings up a very good point, as we did interview her and we specifically asked her about the March 2002 incident, and she indicated to us that she was released that (inaudible.) That's why her statements at trial were such a surprise. Not all the statements we asked her were in the notes, and that part was not in the notes. That was something she said to us verbally. We didn't record everything. That's why we couldn't impeach her with that.

The issue is we didn't know about her arrest, the issue about what happened afterward.

And to be quite honest, right now, I'm not sure whether she went back to jail or not. We still don't know for sure, you know, based on the rap sheet

which I guess the State is saying wouldn't indicate whether she went back to jail or not. You can't tell. We should have been entitled to that information, because it dealt very crucially with their credibility. If she identifies Mr. Fletcher being arrested for a parole violation and then is released, that has serious consequences to her credibility before a jury. Even though she wasn't offered a deal, there is some inference that she received preferential treatment.

If she went back to jail, there is no inference. But we don't know that for sure. I'm not sure if we still know that. That is information we should have had prior to trial, especially concerning that Miss Friend had given us different information.

MS. O'CONNOR: To answer your question, Judge, the notes that we were tendered very late in the game, in fact, weren't tendered until I asked for them, maybe like the day of trial, they are only dated March 24, with no year.

But the FAX date is October 29, '04 where it was FAX'ed to Jenner and Block by their investigator. So -- and there is nothing on there about her responding to any questions about her parole violation. Which of course, since trial, if Counsel really wanted to know,

he certainly could have found out.

THE COURT: Go ahead, Defense.

MR. SALTIEL: With respect to those notes, clearly they weren't given to the State on the eve of trial. If they were sent to her this October, that was three months prior to trial.

MS. O'CONNOR: They weren't sent to me in October, Judge.

MR. SALTIEL: This was an issue of one of the pre-trial hearing dates, and I'm --

THE COURT: Okay.

MR. SALTIEL: Because they were tendered and it was discussed and tendered shortly thereafter that meeting, and it was clearly before December. They had at least several months.

With respect to the statements made during the closing, it's very clear in the transcript that the State argued, and I believe the motion is correct, at least four times she stated that Miss Friend had no reason to lie.

And that is on Pages 72 through 74. She repeated that over and over. You know, she came here to tell you the truth. She has no motive to lie. She did repeat this. It's clearly in the transcript.

And the problem with that is given the history of Miss Friend and the difficulties she had coming to court, we think that that is, those were improper statements.

But the biggest problem for us is we were unable to impeach her about her arrest after the March 15th identification of Mr. Fletcher, because we were never privy to that information.

THE COURT: Let me ask you. Did you receive the nine-page sup that said she had was arrested on March 7, '02, for a parole violation warrant?

MR. SALTIEL: Yes.

THE COURT: And the updated rap sheet you received afterwards -- are you saying that the Chicago Police criminal history reports deal with parole violations?

MR. SALTIEL: Your Honor, I will admit, I'm not an expert on what the Chicago histories --

THE COURT: Well, the updated rap sheet that you do have, does it --

MR. SALTIEL: It usually lists whether there was convictions and court dispositions.

THE COURT: Right.

But it mentions a sentence of Illinois

Department of Corrections time, but the parole violations I don't believe are part of an updated rap sheet.

And I'm looking at both ones that were tendered on Miss Friend, and it doesn't establish one way or the other a parole violation and the result of a parole violation.

So if you had received that document, are you saying that your cross-examination of her would have been based on that document?

MR. SALTIEL: No. What I'm saying, we should have received that information to indicate whether she had or had not, because I think it's directly relevant to this case.

THE COURT: Where would that information come from?

I'm sort of confused here. You had an individual Miss Friend testify in court that she gave a statement on March 2. You had information that she had been arrested on a parole violation.

Your investigator interviewed her with another party present?

MR. SALTIEL: There were several.

THE COURT: That could have been addressed by

way of impeachment based on an oral statement.

MR. SALTIEL: The issue with that oral statement is the person who was, it was given to was counsel of record, me. And there was no other third party to verify it.

THE COURT: All right.

In regards to issue No. 3 -- and this is now the the testimony of Miss Friend -- she testified as to a photo array, and a, and that she was released from custody after identifying Mr. Fletcher.

The issue that the Defense brings out is that they did not know the result of the parole violation.

I believe Paragraph 15 says the State did not produce any evidence to indicate that Miss Friend was sent back to jail for a parole violation.

Well, there was evidence presented. That would be the testimony of Miss Friend. The inference that the jury could or could not have drawn -- and I don't see the inference that Miss Friend was in custody from March of '02 until the trial date. I don't see that. I didn't see it in the transcript. I don't see see it here. I believe she testified, and I believe she was subject to intense cross-examination.

In regards to the statements that Miss Friend

had no motive to lie in closing arguments, that is a logical inference that the State drew because it was implied that she came to court of her own free will.

Now, that's an issue that both sides had knowledge of, and I believe, again, this case was around for some time, and the State at one time made an offer, asked the Court for a ruling or an offer of proof in regards to that particular line of questioning of her reasons for not coming to court. I believe it was presented to the Court in front of Counsel and on the record the date and the specific allegations that Miss Friend's was making or made to potential or threatening -- not potential but threatening events in her life.

Thereafter, the State made a motion. The Defense wanted to bring out the fact that she was here pursuant to a warrant. I said, that would be fine. I believe the Court's ruling was, "But that opens the door to the testimony of Miss Friend of why she wouldn't be here."

I believe at one point the Defense argues that that would have been unsubstantiated threats against Miss Friend. Again, the testimony of an individual before the court is evidence. And I believe it was a specific trial strategy not to get those alleged

threats, one way or the other, in front of the Court.

In regards to the issue of this discovery violation, the discovery principles as established in Brady vs. Maryland is to give all information to both sides. There is a continuing discovery demand, back and forth.

Now, here, we have -- and it's been the Defense argument that the issue was not that they didn't know about the arrest, and not that they didn't know about the violation of parole warrant, because that's on Page 6 of the supplemental report, the issue becomes whether or not she went back.

And my thing is, the Defense is arguing if they had the rap sheet that is part of the exhibit, I believe Exhibit F, they would have been able to use that for cross-examination. That document doesn't establish one way or the other whether or not she went back.

As a matter of fact, it just says an arrest on a warrant for that date. I believe in March of '02, it shows it's a warrant.

So the information was definitely given to the Defense that specific document was not updated. I don't feel that that is a violation of Brady.

However, I do have to say that both sides had

a tremendous amount of opportunity to investigate all issues here. And the fact that Miss Friend, all of her -- let's say everything in her life was before this Court. Her arrest warrant for parole violations. She testified that she had been convicted twice for possession in '03, possession with intent in '98. The Defense had the opportunity and has, as he mentioned today, had the opportunity to interview Miss Friend numerous times prior to trial.

Lastly, in regards to the issue here of whether or not she received any preferential treatment or the inaccurate testimony or perjured testimony, what both sides had was a reluctant witness in the sense that she didn't really want to come to court, but when she came to court she testified.

The Defense had the opportunity to impeach her based on prior statements made to the Grand Jury which there was no impeachment on that, based on statements made to any of their investigators. So there was plenty of material and opportunity to cross-examine Miss Friend.

Now, I don't believe either side as they sit here now can tell us what happened to her after she gave that identification. But it was her testimony that

there were no deals. I believe on cross-examination they asked, "Did you get to go home"? She said, "No, I had to go back for my parole violation." That was her testimony. Nothing in the tendered document established that that was not true. And I mean, nothing in her criminal rap sheet, even the one that was not updated doesn't say that that is true or not true. So that was her testimony.

The other thing, I believe a report was tendered in the course of discovery that there was a parole violation warrant. Both sides had opportunity to subpoena the Illinois Department of Corrections. This case was around a long time. Demand went all the way to 116, plus fifteen days. It was on this call for I believe three years.

Therefore, I don't feel that there was a violation of Brady. That fact that she was arrested on a violation of problem warrant was tendered in plenty of time. It's no doubt that the updated rap sheet was not. But even if the updated rap sheet doesn't get into that fact, what happened to her on a VOP warrant, now, the fact that Mr. Fletcher was not able to verify or impeach Miss Friend's statements regarding her parole violation, I believe they could have.

And the Court erred by ruling that if Mr. Fletcher attempted to impeach Miss Friend due to her failure to appear the State would be allowed to elicit testimony and regard to understand substantiated threat. I never heard the substance of those threats from Miss Friend, because it was after my ruling the Defense decided not to cross-examine her anymore. Again, that is more trial strategy than anything else at this time.

In regards to Paragraph 19, I believe the Court was proper in making their rulings on this 120 day speedy trial demand. As I think both sides realized this case has been around, the term was running, the demand was running, there were motions filed, continuances filed, and demands filed, and I believe the prior rulings by the Court were proper.

In regards to closing arguments, the facts, the argument by the State was not improper, and I do not go along with all the Defense arguments that certain inferences were made.

The one that the Court does not see at all as the inference that Miss Friend had been in custody from March of '02 until the trial date.

Having said that, I don't feel the State has met their burden on this issue --

MS. O'CONNOR: The State?

THE COURT: I'm sorry. I'm sorry. What did I say?

MS. O'CONNOR: You said you felt the State hasn't.

THE COURT: I'm sorry. The Defense had not met their burden in this regards.

Therefore on Count 3, motion will be denied.

Count 4. I believe I don't need to look at -- we're on issue Number 4.

MR. SALTIEL: Your Honor, it was our position that the jury's verdict was against the manifest weight of the evidence.

First off, there was no physical evidence that was presented at trial. The only evidence that was presented was the eyewitness identification of two witnesses.

As is often quoted, it seems to be the term of art, reliability is the lynchpin of the identification testimony, and I don't think either of these witnesses were reliable.

First with Mr. Cooper, looking at his description of the events and the descriptions of the suspects at the time, he gives a very vague and general

description. The general height, general weight, he gives an estimate of age, but no real physical characteristics other than that one of the suspects had collar length curl and the other suspect had a ponytail. Other than that, there was no other physical description given by Mr. Cooper.

In fact, after he was shown a photo array by the detectives, he testified that he could not be completely sure based on that photo array.

He then saw an in-person lineup, and after the in-person lineup he stated to our investigator that he could only be 75 percent sure of his identification at that time because it's been too long since the incident, and that was in 2004, September, a few months prior to trial.

Now, the other eyewitness, Miss Friend, was unable to give any description of one of the suspects, and even I believe stated she couldn't identify the other suspect if she had to. She was only able to give a very limited description of Mr. Fletcher, and that description was essentially that the suspect had dark clothing on, and that, and the suspect was carrying a black skull hat. There was no physical description, any features, any general height, weight, given by Miss

Friend.

Miss Friend obviously had a lot of memory problems about the issue. In fact, her memory was so bad at trial she didn't even get her age right. She testified under oath she was eighteen when this occurred. According to her date of birth, she was sixteen. It's a minor fact, but it illustrates that this happened a long time ago and her memory was not the best.

Looking at the witnesses' testimony individually, there are a lot of issues that deal with reliability of these witnesses. It gets even worse when you match them up next to each other. Their descriptions, the description of the suspect -- Mr. Cooper said they're wearing baseball caps. Miss Friend said they're wearing black skull caps. Then a third witness, Mr. Wade (phonetic) said hoodies.

Three different witness; three different descriptions.

As far as the hair, which was the only aspect that Mr. Cooper really gave any relevant description of, that the suspect had collar length curl and the other a pony tail. Miss Friend said you couldn't see the hair because it was under the skull caps.

There is a lot of inconsistencies here. Not only were there inconsistencies between the witnesses' identification testimony, but their descriptions of the event at the time were inconsistent. There were some minor things where they got -- they were inconsistent about things like the weather. One said cold. The other said it wasn't cold. Things like that.

But the primary issue had to deal with the events leading to the robbery. You had testimony from Mr. Cooper who said he made his delivery. He was coming back to his bread truck with the trays in his hand. At that time Miss Friend approached him to ask him for money. Mr. Cooper stated that he didn't give her any money because he had the bread trays in his hand, so he was going to his truck to put the bread trays back, and that's when the suspect approached him, hit him, and the suspect went into the van at that time.

According to Mr. Cooper, Miss Friend was never in the van or the truck, and she never received money from Mr. Cooper.

Yet Miss Friend gives a different side of the story. She said she was talking to Mr. Cooper inside the truck, not outside. She said that Cooper had already given her money and that she was getting off the

truck when she bumped into one of the suspects, and then the suspects went on into the truck to commence the robbery.

You have two different witnesses; two different stories of what happened.

Given the inconsistencies not only in the description of the event, but in the identifications of witnesses, there is too many inconsistencies to believe that these witnesses were reliable.

And I believe the case cited to you was an Illinois case of People vs. McCarthy where they likewise found too many inconsistencies in the witnesses' testimony to conclude that the jury was correct in finding there was, that they were guilty beyond a reasonable doubt.

Now, on top of the inconsistencies between the eyewitnesses, you also, the Court should also consider that there was a pre-trial suggestive photo array and a pre-trial suggestive lineup, and that the identifications that happened pre-trial didn't happen for eleven years after the incident, and that the in-court identifications happened over fourteen years after an incident.

In other words, there is no identifications

made by anybody in the first eleven years since that incident occurred.

Now, you take all this together, the inconsistencies in the testimony, their lack of descriptions, and the length of time, all this suggests that their identifications are not reliable and cannot uphold the jury's verdict.

In the two cases I wanted to direct your attention to in the brief, with regard to the length of time, the first was the (inaudible) case, the U.S. Supreme Court case. In that case they stated a seven month period from the incident to the time of the identification was a very long time indicating unreliability. And that's seven months. And in this case, you know, we have a time span of over ten years.

In the Cassell (phonetic) case was also another case, an Illinois case, where they found that the reliability of the identification was insufficient. In that case the witness had made a pre-trial identification three years after the incident, and the in-court identification didn't come until six years.

And even with those two cases, they were substantially a shorter amount of time.

Here we have almost double that, or much more

time, and there is no way to believe that witnesses can give a reliable identification after eleven years or fourteen years, especially when you look at how inconsistent this statements were. And their testimony was to the Court.

Because these witnesses were unreliable, we ask that you grant our motion for a new trial.

MS. O'CONNOR: In response, Judge, starting with Paragraph 21, complaint of no physical evidence, there wasn't any. But there is no requirement there has to be physical evidence for someone to be found guilty. So we'd ask you to discount that complaint.

And a revolver was used in this case. There are no cartridge cases to be found. The bullets get shot out of a gun and they are hardly ever recovered unless they're recovered in the body of the dead person, which it was in this case.

Because the other bullets that were shot weren't recovered doesn't mean they weren't shot. Bullets travel long distances. They lodge inside buildings, cars, what-have-you. Only with a semi-automatic you often find firearm evidence.

All the discrepancies Counsel alleges that came up between Mr. Cooper and Miss Friend and that they

were of such a magnitude that this Court should vacate the jury's finding, we would submit that if there were discrepancies, they were not of great magnitude. They were simply discrepancies that showed these were human beings that told the truth and did not say they were mirror images, because a human being views something, and everyone's viewing of something is bound to be slightly different than the viewing and remembrance of another human being. And differences simply explain that, Judge, that these are human beings, as we said in our arguments. They're not robots.

The jury found they were credible. The jury had no problem finding this defendant guilty. They were not deliberating for a lengthy period of time.

And the identification, there is no evidence they were suggestive. Counsel says they were suggestive. Well, where is the evidence of that? You know, the pictures are in evidence of the lineup, the pictures of the photo array. The jury obviously didn't find that.

But again, that is not an issue for a jury, and this Court saw them, though, and it would be an issue for the Court to decide. And I think the Court would find there is no suggestivity in these

identification procedures.

But 28, Paragraph 28 makes a statement that identification over ten years old should not suffice as a matter of law. But what law is that? Where is that principle that says that? Where is that? The cases he cites talk about suggestive lineups. There was no suggestive lineup in this case.

The time between the crime and the identification is a negative factor. It's a factor to be considered among many factors. And he fails to list the other factors that were instructed to the jury and the circumstances of identification instructions.

So certainly the jury was apprised that they can consider that length of time and they decided that it did not negate the identification of these two people. And as this Court knows, the case law says an identification of one person is enough to convict a defendant of the crime he's charged with. That it can be, I should say.

In this case there were two people that identified him. And the jury again had no trouble finding their testimony reliable, and there is nothing in the record to indicate that it wasn't reliable, and nothing to indicate that this Court should find the jury

was out of line and that their verdict was against the manifest weight of the evidence.

You denied the Defense motion for acquittal at the close of the State's case based on the evidence you heard, and we would ask the Court to reiterate that finding.

Nothing further.

MR. SALTIEL: As to the witnesses' inconsistencies, I believe in this case it wasn't just a few minor inconsistencies. They re-told two different occurrences. And if they can't get that right, how can we rely on their identification testimony? And how can we rely on it that it's eleven years after the fact?

Granted, there is no case out there that says it's been ten years, it's a per se exclusion that you cannot identify someone at that time. It's a factor to consider.

And the other factors are to look at the length of time that the witness has to view, and the descriptions of the event, and here there is no indication that these people could be reliable because they didn't give any details. They gave very vague, general descriptions, and their descriptions of the events that happened contradicted each other. And that

doesn't indicate any reliability of these witnesses.

Now, as far as the point with the lineups, it's not that -- we're not arguing in this motion per se they were impermissibly suggested as a violation of the due process rights. But we are saying just in general is that they were suggestive.

And I think they were. You had Mr. Fletcher who is the only person in both lineups. That is an indication that it was suggestive. Anybody who saw the first lineup and sees the second lineup with only one person in common, that is a suggestion right there. Who do I pick out? Well, the same guy in the last one, because everyone else is different.

You look at the photo array. There were huge age discrepancies with most of the people in the lineup. Some of them weren't old enough to be out on the streets at that time. They were nine, ten years old. Now, a lineup that includes those type of people obviously cannot be completely unsuggestive.

And there were also physical descriptions that were impaired in both the photo array and the in-person lineup which were obvious from looking at the pictures.

So we put to the Court that the photo array and the in-person lineup were suggestive.

And with the length of time, although I guess the converse can be said to the State, that I don't think there is any case out there that says that, you know, identifications are good no matter how long they are, in fact there, there is a very unique circumstances that we have to deal with. All we can deal with are the cases that are there, and most of these cases that come up, we're talking about a year or two year maximum delay.

The one case we were able to find was a three year delay between the out-of-court identification and six year in-court, and they clearly found that was too long. In this case we are talking about a delay much greater than that.

Given the fact that these witnesses' testimony were inconsistent and unreliable, we find that the evidence was against the manifest, or against the jury's verdict, and we'd ask that you grant us our motion for a new trial.

THE COURT: Okay.

The Court's review of issue Number 4, that the verdict was against the manifest weight of the evidence, in Paragraphs 20 through 30, and Counsel's argument today, it became obvious to the Court that each and

every one of these arguments was presented meticulously to the jury.

Just going over some of them, it was brought out there was no weapon. It was brought out about Mr. Cooper's involvement. It was brought out the photo array. It was brought out the lineup. And even in Paragraph 26, it establishes that the Defense impeached Miss Friend.

So what we have here is the testimony of two eyewitnesses, and there are cases that say eyewitnesses testimony may be inherently or is inherently reliable.

There is also cases that say a single finger ID could be sufficient depending on the facts of the case. And the facts of this case, when Counsel describes the inconsistencies, I believe you have to look at the entirety of the testimony.

Mr. Cooper was honest. He said that he was only 75 percent sure, and that was brought out.

Miss Friend testified what she saw, and that she identified the defendant.

Both these individuals made identifications. The conclusion in Paragraph 25 that they were only made after a suggestive photo array and suggestive lineup, again, that fact was once again meticulously argued to

the jury, every specific incident. It was even brought out the defendant at the time of this incident had some unique physical characteristics that were never identified by anybody.

In looking at the entirety of their testimony, I believe that the jury listened to their testimony, weighed all of the arguments that I listened to once again, all of the inconsistencies, all of the facts before it, and decided that they had received information of proof beyond a reasonable doubt.

Lastly, in regards to the proximate cause and felony murder theory, I believe the State and the Defense argued that once already. And I believe I ruled that felony murder did apply.

Now, the Defense is basically asking this Court to overrule the jury verdict that was found after testimony at trial.

I listened to the arguments here today. I understand that there were inconsistencies, that there was a length of time beforehand. But I'm not going to decide as a matter of law this case should be dismissed here today. The jury's verdict was -- I believe we had a reliable jury that took their notes, listened and weighed the testimony of the evidence, listened and

weighed the testimony and the arguments of counsel, and I do not believe that the facts presented here in the motion or at trial would allow me to dismiss their decision for a finding of guilty.

Therefore, on People's Exhibit No., I mean argument Number 4, the motion will be denied.

That leaves us with the last issue, reversible error.

MR. SALTIEL: You are -- there are actually multiple issues raised. For the time being, we are going to stand on our arguments in the papers, except for one of the issues I would like to address briefly.

THE COURT: Go ahead.

MR. SALTIEL: And that is the State's, the closing argument made by the State, which is Paragraph C.

I believe there is two issues with the -- we have two issues with the State's closing argument and why we believe it is improper.

You know, first, there were -- we believe there were several arguments that were made by the State that were not supported by the evidence, both in their regular closing and in their rebuttal.

I'm aware that the Court did give instructions

to the jury about that, that they are the trier of the fact, they heard the evidence, they should pay attention to that, over our objection. But we still think that that had a prejudicial effect on the jury.

More importantly is that the State essentially sandbagged us on our, their closing. They didn't really give a closing argument. They gave a cookie cutter, any murder case, plug in the facts, nothing special, for their closing. They waited for us, and then they gave their real closing in rebuttal.

Not only did they raise facts that were not presented in evidence before the jury, they were raising arguments we never raised in our closing.

And it's clear from the case law that, at least in the one cases we cite for you, in that case, rebuttal argument in that case constituted reversible error because it was not based on evidence nor was it invited by comments by the Defense.

And I think this is a similar case. There were statements made by the State in its rebuttal specifically that weren't supported by the evidence, such as I believe at one point the State made the argument that the eyewitnesses are reliable because, you know, listen to their description on the hair and nose,

physical description that they gave. Well, they never gave those physical descriptions. So that was one example.

The other, not only were there factual problems, I think there were responses, or the State essentially responded to arguments that we never made in our closing argument.

In particular, I think what happened is that we had made several arguments in our motion for a directed verdict that was not presented in front of the jury. What the State did is they made a rebuttal assuming that we had given those arguments to the jury. And although issues we raised on the motion for a directed verdict were not made to the jury, never presented to the jury, then all of a sudden the State is now arguing these issues never raised and they had no idea about.

Based on this, we believe that the State's closing argument was improper, and that alone constitutes grounds to give us a new trial.

MS. O'CONNOR: Judge, in response to that last argument, I don't know what statements he's saying are improper that were made during closing argument. It's sort of hard to respond to the argument.

But it's our position that everything said in rebuttal argument was rebuttal to what the Defense brought up in their argument.

I don't know what sandbagged, how we sandbagged them. If they wanted to object at that time, they could have. I know Mr. Hill objected at one point on Page 69. There's possibly a couple of other objections. But there weren't many objections. So I don't really know what they're saying was improper.

The Court made whatever rulings on their objections at the time. I don't think the Court thought the arguments were improper. And we submit that they were based on the evidence.

I don't recall -- and I think Counsel is incorrect in telling the jury that we told -- Counsel is incorrect in telling the Court that we told the jury that the witnesses gave any descriptions to the police that they did not give. Certainly, if they objected to that and the Court said the jury heard the evidence, they can rely on their own recollection and notes. That is an instruction to the jury that the arguments is all that is, is just arguments, and they are to rely on the evidence, and that the arguments are not evidence.

If there was any mis-statement made, I believe

that that instructions would certainly cure any mistakes and mis-statements of the evidence.

But I don't recall any wholesale mis-statement of the evidence, or wholesale sandbagging, or wholesale argument that was not in response to their closing argument.

Paragraph E, they say the Court erred in prohibiting testimony from (inaudible.) That would be asking for an opinion of these witnesses. It would be impermissible and irrelevant in this case.

Certainly, if the Defense wanted to argue that Rogers may have been involved in the incident and they thought, and the Court thought that was a reasonable inference therefrom, they could have. But to ask an opinion of a lay person and even from a detective whether someone may have been involved in the case would be an impermissible conclusion to allow them to make. There is no such thing as, you know, an expert in the field of suspicion.

In Paragraph G, they allege that the State violated their client's right to due process, relied on testimony from Mr. Cooper that, assuming it knew to be false, and allowing such testimony to go unrebutted -- once again, an allegation that the State suborned

perjury in this incident and nothing to back it up. No good faith basis whatsoever for such a statement.

Mr. Cooper is a man that came in and said he was 75 percent sure of his identification. What it is that they're saying he said that we knew to be false, I don't know.

They say Cooper said he was shooting in a certain direction when the State knew he had been arrested for shooting the van. He was arrested for possession of a gun, not for shooting Mr. Wade's van.

So once again, they're incorrect making allegations that are false in this motion. And we object to that.

There was never any determination as to who shot that van. Mr. Wade thought it was Mr. Cooper. But you know, that is a lay person's guess. There were two men shooting, and certainly from the diagrams that were used in this case and the photographs, it was clear that it was only the defendant's bullet that could have killed this victim, Judge.

And once again, he was not arrested for shooting Mr. Wade's van. He was arrested for unlawful use of a weapon.

The State argued in its rebuttal,

Mr. Fletcher, that he was not supposed to have a gun on that truck. We submit that the Court ruled correctly in all the areas that are listed in Paragraph 5. That we had extensive arguments on all these issues, and we'd ask this Court to concur in its prior rulings.

THE COURT: Okay.

Defense, your last word.

MR. SALTIEL: Well, at least according to the arrest sheet, Mr. Cooper was arrested for more than just unlawful possession of a weapon. He was also arrested for aggravated assault against Mr. Wade. So we believe that statement is incorrect.

Mr. Cooper only remembered being arrested for unlawful possession of a gun. There is a distinction there.

There were several arguments that the State raised in its closing argument that were not raised in the Defense's close.

First of all, there is this argument -- and a lot of these came from the motion of a directed verdict, you know, Mr. Cooper could have been responsible for shooting the victim, it could have been his bullet. That was not something we argued to the, to the jury during close.

There was also the felony murder theory which we argued on our motion for a directed verdict. That was something she argued in her rebuttal. We never presented that to the jury. We never made those arguments.

And also this issue about why Cooper, Mr. Cooper lied. He never stated why he lied. There was only that he had lied. And that was his only testimony. He lied to save his job, was something that came out of the police reports. There was no direct evidence of this.

None of these issues were raised, not only in the Defense's closing statements, they weren't made in the State's, what you call them, first closing statements.

THE COURT: Opening close.

MR. SALTIEL: Opening close.

They also made other statements in the beginning of their close such as they went through this elaborate statement that Mr. Fletcher had a plan and motive. There was no evidence of that presented at trial. They made him out to be someone when there was no testimony to support those statements.

We think, you know, all of these statements

you know, taken together, were improper for the State to be making in its close. They were in fact saving their close for the rebuttal argument. That was something improper and they shouldn't have done.

As far as the other issues listed in Number 5, for now, the Defense will rest on its positions, on those positions, unless the Court would like to hear any specific argument.

THE COURT: No. No thanks. I have looked it over.

Going to the last issue before the Court, Number 5, that the Court made other reversible errors, I believe we have addressed this issue, that the Court erred in denied Mr. Fletcher's motion to dismiss the indictment for failure to commence this action within a reasonable time, so I won't address that. That has been addressed the second part of that is that Mr. , it goes on to say Mr. Rogers who is a central figure in the police investigation and a one time suspect until he identified Mr. Fletcher was not present at trial. Mr. Rogers was available prior to 1995 and again in 2002, but was unavailable at Mr. Fletcher's trial in 2005. Mr. Rogers is the key witness from the police investigation because he originally led the police to

Mr. Fletcher. And Mr. Rogers only identified Mr. Fletcher after the police went to question him about his alleged involvement in the 1990 incident.

Furthermore, Mr. Rogers has friends, was friends with Mr. Cooper and Miss Friend.

In light of Mr. Rogers' role, Mr. Fletcher could not have had a fair trial without the opportunity to cross-examine Mr. Rogers.

This has been a recurring theme in regards to the Defense. However, the Court does not dictate who the witnesses are going to be. That is a strategy by the State and the Defense how they want to present their case.

The fact that Mr. Rogers did not come in to court and testify, I cannot decide based on that, because there was never any legal argument by either side that Mr. Rogers was unavailable and that we needed any service of process to bring him in.

I have addressed this issue before in regard to there had been motions by the State in attempting to locate him. The State decided after there was a demand for trial to proceed without Mr. Rogers. At that time the Defense had the opportunity to continue with their demand, ask for a continuance, or to proceed to trial.

The decision to proceed to trial knowing that Mr. Rogers wasn't going to be present was a Defense tactical decision.

Therefore, for the Defense to tell, ask the Court now, it wasn't a fair trial without him, this Court was never asked to continue the case to bring in Mr. Rogers, was never asked to issue any warrant for Mr. Rogers.

Therefore, the last thing I have to say in regard to Mr. Rogers is that this Court does not dictate what witnesses should be presented to prove the State's case or to prove the Defense case.

I'm moving on to Paragraph B, that the Court erred in stating that it would have allowed Officer Martin to testify about Mr. Rogers' bad acts in regards to 1990. I believe the issue at that time was that the Defense had Officer Martin who made an arrest or was familiar with Mr. Fletcher in 1990, and they wanted to call him to testify that of his physical character.

And a sidebar, at a motion, the State presented or argued that they would then be able to question what were the circumstances surrounding the contact with Officer Martin and Mr. Fletcher. The identification would not come in in a vacuum. The

Court's ruling was if Officer Martin testifies, the State would be able to cross him in regards to what specifically those contacts were.

In regards to the last part of that Paragraph, that Mr. Martin would have been a, Officer Martin would have been a non-biased witness who could have affirmed that their witness did not match the witnesses' description of the suspects, and he would anticipate a witness' description to include a reference to Mr. Fletcher's large lips, Officer Martin if he were able to testify could not testify to what somebody else would have or would not have done.

So that particular part of the paragraph would not make any sense here.

Going on to Paragraph 3, the crux -- not the crux, but the argument that was elicited was it was improper arguments in a closing statement. In regard to the closing statement, the opening close by the State, the close by Defense and then the rebuttal by the State, in rebuttal argument the State has the opportunity to rebut any evidence, any arguments or inferences. And I believe that there are inferences, aspects here are the inferences that were brought out at trial.

And I recall specifically the Defense argued

quite clearly and credibly and persuasively their point of view. It was a lengthy argument. I can't remember how many pages. But it basically again went over every aspect of the case, every inconsistency, every reason that the jury should not believe the State or their witnesses.

I don't believe that there was any improper arguments in the rebuttal, and I think I have to say that was because of the thorough nature of the Defense arguments. As a cliche, they left no stone unturned. And I think the State was able to get into a lot of those arguments because of the length of it and the inferences.

But the Defense presented in the Court's opinion a detailed analysis of each and every witness from the time this investigation basically began to the trial. And the State had an opportunity to rebut or argue against those inferences.

I don't believe this was an issue of the State's sandbagging. I believe the rebuttal was proper.

With regard to Paragraph D, the Court erred by prohibiting Mr. Fletcher from questioning Mr. Wade about statements and behavior of the police when the police questioned Mr. Wade about the incident, it goes on to

say during his investigation, Mr. Fletcher learned that the police made statements to Mr. Wade that implicated Mr. Fletcher in this incident prior to the police showing Mr. Wade a photo array.

I'm a little concerned here, because Mr. Fletcher according to this, performed some of his own investigation. But I believe that the Defense or the State can only question if there is a good faith basis that they would have an ability to prove that up. That statement by Mr. Fletcher, I don't believe the Defense could have questioned him, if they were going to prove it up. But you can't question somebody knowing that you are not going to prove up the part of that question. I believe that the issue was brought out at trial in regards to Mr. Wade. I listened to both arguments, and I ruled in regards to what I thought was the proper decision.

In regards to Paragraph E, again, we go into the issue of Mr. Rogers. I think I have addressed that in regards to this Court doesn't control who the parties decide to call as witnesses in a given case.

In regards to the Court's ruling on closing statements or closing arguments, I believe the decisions by the Court and the rulings were proper and the remarks

proper. Therefore I will not address anything further on F.

And in regards to the State's decision to argue Mr. Cooper's actions on that day that they knew to be false, I don't see that. I believe, again, there's logical inferences both ways that were argued.

And thereafter in regards to the entirety of the Sub 5, motion for a new trial will be denied.

That leaves us, Counsel, with the pre-sentence investigation.

Have both sides had an opportunity to review that document?

MS. O'CONNOR: I have, Judge.

MR. HILL: I have not.

THE COURT: You don't have the PSI?

MR. HILL: No.

THE COURT: Well it's been filed.

MS. O'CONNOR: On March 21.

THE COURT: I'll give you a copy, and we'll take some time and go over it with your client.

My question is when you are done with it, are there any changes, deletions, or additions prior to starting?

MS. O'CONNOR: I definitely have an issue I

need to bring up.

The pre-sentence investigation --

THE COURT: Hold on. He doesn't have a copy. He'll have to take a look at the copy.

MS. O'CONNOR: Is there only a blue-backed copy in the court file?

THE COURT: Yeah, that's all I see.

MS. O'CONNOR: Which indicates the second copy --

THE COURT: Well, there was a second copy handed out.

I don't necessarily put that on the record. But having said that, we'll be able to get a copy.

I'm sorry. No.

Counsel, it's in here.

MS. O'CONNOR: Does the Court anticipate proceeding to sentencing?

THE COURT: Are both sides ready today?

MR. HILL: We're not ready.

MR. SALTIEL: Our position, there are some issues with his background and length of time we'd like to investigate for sentencing.

THE COURT: All right.

It's pretty late, too.

What date are we looking for?

Can we address your issue?

MS. O'CONNOR: I hope so.

THE COURT: Let's try to do that before we proceed for the day, so you can put notes on that whatever the State is going to bring out at this time.

MS. O'CONNOR: What I notice about the PSI, the rap sheet, the Chicago, I should say, the Chicago criminal history by CPD is on the new, on their new format, which I believe is part of the CHRIS system, by the Chicago Police Department in this case earlier on which this case first was indicted are under the old format, and that was tendered to Counsel.

Now, the problem is that the defendant's murder conviction from 1980 is not reflected on the new version of the rap sheet. And I certainly don't know why that would be. It's on the old version.

And I can show the Court what I'm talking about.

THE COURT: That's okay.

MS. O'CONNOR: But I would ask leave to make this a part, the old version a part of the PSI.

THE COURT: I'll let you make copies.

MS. O'CONNOR: They have a copy of it.

THE COURT: All right.

If you have a copy, I'll make it part of the PSI.

Is there any other material that you're going to be tendering at the sentencing hearing in regards to his prior background?

MS. O'CONNOR: Any other material --

THE COURT: Certified copies.

MS. O'CONNOR: Oh, I do have certified copies, Judge.

THE COURT: Have you made a copy for the Defense?

MS. O'CONNOR: I don't know if they have copies of those or not.

THE COURT: Let's do this.

I'll give you a couple of weeks to get everything together in regards to the certified copies.

Defense, I'll give you as much time as you need to investigate that, and we'll set it down for sentencing at an agreeable date.

MR. SALTIEL: Your Honor, just to clarify, we'd like to request that the State provide us with whatever documents they're going to us, if they're going to attach the criminal history, just in case there is --

THE COURT: Well, he does have the criminal history now. They have the old system, the old, I'll called a rap sheet --

MS. O'CONNOR: That was tendered with the discovery.

MR. HILL: I don't know what she's talking about. I'd appreciate if she can just get a copy of what she is talking about. It seems to be simple enough.

THE COURT: So you are tendering a --

MS. O'CONNOR: Judge, I -- it's the old version of the Chicago criminal history prior to the CHRIS system. This is the rap sheet tendered with discovery.

But I'll make a copy and tender it to Counsel again.

MR. HILL: Thank you.

THE COURT: And then, you also make copies of the certified convictions?

MS. O'CONNOR: Yes.

I can show them to them right now, if they want to see them.

THE COURT: Yeah. But I think they want to investigate the whole matter and I'll give them time to

do that.

MR. SALTIEL: What date are you looking for?

THE COURT: Whatever date you want.

In the meantime, tender any discovery, all discovery should be tendered back and forth.

MS. O'CONNOR: I'll FAX those to their office when I go back to my office.

THE COURT: What date are we looking for?

MS. O'CONNOR: I'm here every day.

THE COURT: So am I.

Counsels, what's a good day for you?

MR. SALTIEL: I think sometime in the last week of July.

THE COURT: How is the 29th -- or, I'm sorry. The 28th.

MR. HILL: Looks like the 28th is fine.

THE COURT: By-agreement, 7-28-05, for sentencing.

The PSI is tendered. State will tender additional discovery.

What I'd like to you do also is tender each other, if there is going to be witnesses, a list of witnesses for the sentencing hearing.

Thank you.

(Whereupon the above-entitled cause was continued to 7-28-05.)

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

I, VICTORIA A. ONDRISKA, Official Court Reporter, do hereby certify that the foregoing Report of Proceedings was reported by me, and is a true and accurate transcript of my shorthand notes so taken.

Victoria A. Ondriska